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Supreme Court, U.S.
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No. OFFICE OF THE CLERK

In The Supreme Court of The United States

MIDLAND CENTRAL APPRAISAL DISTRICT,
Petitioner,

v

BP AMERICA PRODUCTION CO., *et al.*,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE TEXAS COURT OF APPEALS FOR THE 11TH DISTRICT AT EASTLAND

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

This case specifically involves *ad valorem* taxation of an immense inventory of oil constantly present in a number of large tanks and whether that oil is shielded from taxation by the Commerce Clause, U.S. Const. art. I, § 8, cl. 3, because individual barrels come and go quickly. Thus the broader question is:

Given a constantly present massive inventory of goods bound for interstate commerce, does the fact that individual units of those goods are "in transit" result in the goods being exempt from local taxation under the dormant Commerce Clause?

PARTIES TO PROCEEDING BELOW

PETITIONER:

Midland Central Appraisal District.

The petitioner is a governmental entity, specifically a political subdivision of the State of Texas. It is not a nongovernmental corporation. No statement is required under Rule 29.6.

RESPONDENTS:

BP America Production Co., Amerada Hess Trading Company, Chevron USA, Inc., ChevronTexaco Products Company, ChevronTexaco Global Supply and Trading Company, Teppco Crude Oil LLC , and Teppco Crude P/L LLC.

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MIDLAND CENTRAL APPRAISAL DISTRICT,
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PETITION FOR WRIT OF CERTIORARI

The Texas court of appeals below has held a generally applicable, non-discriminatory *ad valorem* tax on an inventory of oil to violate the dormant Commerce Clause. On substantially similar facts, the Oklahoma Supreme Court concluded otherwise. When the Oklahoma case was brought to this Court's attention, it sought the input of the United States Solicitor General who concluded that the Oklahoma Court ruled correctly. Brief of U.S. as *Amicus Curiae, Missouri Gas Energy v. Schmidt*, No. 08-1458. Another Texas case, *Harrison Central Appraisal Dist. v. Peoples Gas Coke & Light Co.*, No. ___, is also before this Court, having been decided similarly to this case below. Thus, a dichotomy of state court opinions exist on a key issue of Constitutional law which begs for this Court's resolution.

CITATIONS TO DECISIONS BELOW

The official cite to the case for which this Petition for Writ of Certiorari is sought is: *Midland Central Appraisal District v. BP America Production Company et al.*, 282 S.W.3d 215 (Tex. App. – Eastland 2009, petition denied). The trial court issued findings of fact and conclusions of law. Appendix D.

STATEMENT OF JURISDICTION

This Court has jurisdiction to hear this case under 28 U.S.C. § 1257(a) because it involves a substantial federal question decided by a state court of last resort. The Texas Supreme Court denied the petition for review on May 12, 2010 and denied the motion for rehearing on October 1, 2010. Appendix B, C. The Petitioner has not sought any extensions for filing this petition for writ of certiorari.

CONSTITUTIONAL AND STATUTORY PROVISIONS

1. U.S. Const. art. I, § 8, cl. 3:

To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes

2. Tex. Tax Code §11.01(a)-(c):

> (a) All real and tangible personal property that this state has jurisdiction to tax is taxable unless exempt by law;
> (b) This state has jurisdiction to tax real property if located in this state;
> (c) This state has jurisdiction to tax tangible personal property if the property is;
>
> (1) located in this state for longer than a temporary period;
> (2) temporarily located outside this state and the owner resides in this state; or
> (3) used continually, whether regularly or irregularly, in this state.

STATEMENT OF THE CASE

Similar to *In re Assessment of Personal Property Taxes Against Missouri Gas Energy*, 234 P.3d 938 (Okla. 2008), *cert. denied*, 130 S.Ct. 1685 (2010), this case involves enormous quantities of hydrocarbons, in this case oil, constantly present in a holding facility. As in *Missouri Gas Energy* and *Peoples Gas, Light, & Coke Co. v Harrison Central Appraisal District*, 270 S.W.3d 208 (Tex. App.—Texarkana 2008, petition denied), this case presents the question of whether a non-discriminatory *ad valorem* tax on that oil is prohibited by the dormant Commerce Clause.

The Respondents are "Oil Companies," each of which owned a massive inventory of crude oil during the tax years 2003 and 2004, as they have for many previous years, that was continuously present in the four tank farms in Midland, (collectively, "the Midland tank farms"). Reporter's Record (RR) 3:93-94; D. Ex. 2, 7, 15, 16, 19, 20, 27-29, 33-54, 75-92. Because of the tank farms, Midland is the only marketing center for oil in Texas. RR 5:76; 7:39, 96. The Midland tank farm facilitates the Oil Companies' marketing activities; it allows them, through a "blending" process, to upgrade the quality of oil volumes, and, through a "batching" process, to gather in the tanks for shipment by pipeline the quantity and quality of oil specified by the purchaser. RR 7:39-40. Because Midland has no refineries, the oil ultimately finds its way to refineries in Texas or other states through two outgoing pipelines. RR 3:69.

The oil in the Midland tank farm arrives by pipeline or truck and leaves by pipeline. RR 2:86-88; 4:33-35, 41, 51; 6:7-8, 78-80; 7:19-21, 76. Individual barrels of oil ordinarily remain in the tank farms from between less than a day to one week; but on average, between 24 to 36 hours. RR 3:28; 5:46; 7:25. However, the Oil Companies maintain a constant massive amount of oil inventory in the tank farms throughout the year, as outgoing oil is replenished by incoming oil. RR 3:34; 5:44-45; 7:46-47; 8:53. The tank farms are required to maintain certain minimum volumes of oil for safety reasons. 5:43-44. The Oil Companies also maintain additional volumes in the tanks as "working stock," to facilitate prompt shipments to customers. RR 3:26-27, 51-52. At any given time, the oil companies' inventories of oil in the Midland tank farms collectively total around 3 million barrels. D. Ex. 3, 14, 23, 58, 96.

Petitioner Midland Central Appraisal District included on the tax rolls for the tax years 2003 and 2004 an allocable share of each Oil Companies' inventory of oil that was present in the Midland tank farms on January 1 of those years. RR 2:63-78; 9:16-39. The Oil Companies contested taxation of their oil, and following a bench trial, the trial court rendered judgment in their favor. The court of appeals affirmed, concluding that (1) the oil was shielded from taxation by the Commerce Clause of the U.S. Constitution and (2) the oil did not acquire a taxable situs in Midland County because it was in interstate commerce. The Texas Supreme Court denied review.

This case was tried on federal issues from its inception. Note the Findings of Fact and Conclusions of Law of the trial court in Appendix D. Particularly, Conclusions of Law 3 and 6 describe the federal issues tried. Furthermore, also note the Defendant's trial brief at Clerks Record (CR) 217-239, discussing at length the federal issues involved.

The court of appeals' decision squarely rested on its interpretation of the Commerce Clause. Note *BP America*, 282 S.W.3d at 221-24. Appendix A. The issue was, of course, briefed by both parties at the court of appeals. That court, in spite of the prior ruling in *Missouri Gas Energy*, chose to adopt the antiquated interpretation of the dormant Commerce Clause expressed in *Peoples Gas*, thus widening the conflict between Texas and Oklahoma as well as between Texas and federal precedent.

At the petition for review to the Texas Supreme Court, the District raised federal issues. Appendix G. Likewise, the issue of whether the oil was protected from local taxation by the Commerce Clause was raised in the motion for rehearing to the Texas Supreme Court.

REASONS FOR GRANTING THE PETITION

I. Policy overview

The Texas court of appeals rendered a decision that a massive quantity of oil constantly held in inventory in tank farms in Midland is shielded from local taxation under the dormant Commerce Clause because the oil is purportedly "in transit" in interstate commerce. *BP America*, 282 S.W.3d at 224. This Court should exercise its discretionary review for multiple reasons, summarized as follows:

1. The court below has reached a decision on an important question of federal law that has not been, but should be resolved by this Court. Namely, whether a massive quantity of inventory establishes a nexus with the state of its location such as to meet the criteria for local taxation under the *Complete Auto* test, even though individual units thereof may be "in transit," *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977). The Oklahoma Supreme Court has decided in favor of taxation while the Texas court below has decided against. This Court, noting the importance of the issue, requested the Solicitor General's opinion on the Oklahoma case. She concluded that the Oklahoma Supreme Court ruled correctly. Brief of the U. S. as *Amicus Curiae*, *Missouri Gas Energy v. Schmidt*, No. 08-1458. Review is thus available pursuant to U.S. Sup. Ct. Rule 10(c).

2. Furthermore, the Texas decision is manifestly wrong, being in direct conflict with this Court's precedent, and it creates the unjust result of large corporate citizens being exempted from taxation in one state while subject to taxation in an adjacent state, under no legally distinguishable circumstances. Particularly, in view of Texas' significant economy and volume of case law, the dichotomy of results invites forum shopping by multi-state businesses that will in turn result in economic conflicts between the states. Therefore, this Court has discretionary review under U.S. Sup. Ct. Rule 10(b).

3. The decision in question is effectively the decision the Texas court of last resort, particularly given the similar result in *Peoples Gas, Light, & Coke Co. v Harrison Central Appraisal District*, 270 S.W.3d 208 (Tex. App.—Texarkana 2008, petition denied), which directly conflicts with the Oklahoma Supreme Court's decision in *Missouri Gas Energy*, 234 P.3d 938 (Okla. 2008), *cert. denied*, 130 S.Ct. 1685 (2010) on a very important federal question; namely, whether massive quantities of goods constantly present in a jurisdiction are shielded from local taxes by the dormant Commerce Clause because individual units may be "in transit" in interstate commerce. Though the tax in question is different, the opinion below is also in conflict with *Mississippi State Tax Commission v. Murphy Oil USA, Inc.*, 933 So.2d 285 (Miss. 2006). It is also in conflict with lower appellate court decisions that have become the established

law in Louisiana and Florida. Thus, the Court has discretionary review under U.S. Sup. Ct. Rule 10(b).

4. The Texas court of appeals below found that the oil in question was shielded from local taxation under the dormant Commerce Clause because it was "in transit." Though the court attempted to apply the *Complete Auto* test, the opinion is in diametric conflict with this Court's decisions in *Complete Auto*, 430 U.S. 274 and *DH Holmes Co. v. McNamara*, 486 U.S. 24 (1988). Therefore, this Court has discretionary review under U.S. Sup. Ct. Rule 10(c). At the same time, not only the court below, but many other courts seem to be confused on this point. Note the argument below at 16-19. Therefore, this Court should also exercise discretionary review under U.S. Sup. Ct. Rule 10(c) to settle an important federal question about which the courts below seem to be amply confused.

5. Similarly, another issue needs clarification by this Court: Is the physical presence of the taxpayer by activities in the taxing state necessary to establish nexus? This Court's decision in *Quill v. North Dakota*, 504 U.S. 298 (1992), has been used to support that notion. But, there is ample reason to restrict the application of that doctrine to activities based taxes, not to property taxes. The court below improperly focused on the activities of the taxpayer rather than the presence of the property.

6. These important federal questions also involve massive amounts of local revenue. They are obviously capable of repetition and thus need to be resolved for that reason alone. For example, a short time ago this Court was faced with a petition in *Missouri Gas Energy*, 234 P.3d 938 (Okla. 2008), *cert. denied*, 130 S.Ct. 1685 (2010). Contemporaneously with this petition, a petition is also being filed in *Harrison Central Appraisal District v. Peoples Gas, Light, & Coke Co.*, No. ___, involving the same questions of law and very similar facts. Further, there are personal property *ad valorem* taxes levied in at least 41 states (Appendix F), thus leaving open the possibility of impact of this case in all those states. Other types of state and local taxation are impugned as well. The importance and possibility of recurrence of the issue is further illustrated by the fact that three parties filed amicus brief at the Texas Supreme Court.

   Furthermore, according to the U.S. Energy Information Administration, there are at last report over 240,000,000 barrels of oil in tanks and pipelines in America.[1] Not only that, but the decision below impacts far more than just oil; any inventory in a distribution facility is impacted. Untold litigation will be emboldened by the opinion below as states are encouraged to levy taxes by the result in *Missouri Gas Energy* and the industry is encouraged to contest those taxes

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[1] U S Energy Information Administration, www.eia doe gov/dnav/pet/pet_stoc_cu_s1_m htm (last visited Dec 8, 2010).

by the result below. Thus, both industry and government will be aided by a quick resolution of these controversies by this Court.

II. Dormant Commerce Clause jurisprudence

This case, obviously, presents the opportunity to interpret the dormant or negative Commerce Clause. That is, the critical issue before this Court is only whether the dormant Commerce Clause prohibits the tax on the oil in question. If it does not, this case should be reversed.

A. Dormant Commerce Clause jurisprudence supports taxing the oil.

There is a considered argument that the dormant Commerce Clause is not a legitimate concept and should be discounted. But, assuming the continued efficacy of the dormant Commerce Clause, that jurisprudence supports the tax before the court.

This Court's jurisprudence regarding the dormant Commerce Clause has morphed through the years from one of interpreting it as a complete ban on local taxation of goods in interstate commerce, *LeLoup v. Port of Mobile*, 127 U.S. 640 (1888), to the modern interpretation of allowing taxation under certain criteria. *See Complete Auto*, 430 U.S. 274. While space does not permit an examination of a long history of the dormant Commerce Clause, suffice it to say that, in times gone by, much litigation was spawned over whether

the good was in interstate commerce to begin with, whether it had come to rest, whether it had come to rest for a business purpose or otherwise, as well as a host of subtle nuances.

However, with its decision in *Complete Auto,* 430 U.S. 274, this Court held that a tax on goods in interstate commerce is valid if it: 1) is applied to an activity or thing with a substantial nexus to the taxing state; 2) is fairly apportioned; 3) does not discriminate against interstate commerce; and 4) is fairly related to the services provided by the state.

The court below found fault only with the first prong; that is, whether the tax was applied to an activity or thing with a substantial nexus to the taxing state. That opinion below errs in finding no nexus and merits grant of petition and reversal.

1. Constant presence of massive quantities

A massive volume of oil inventory exists in scores of tanks located in the tank farms in Midland County, Texas. The capacities of the tank farms are about six million barrels. At any given time, it is likely that approximately three million barrels are present in the tank farms. RR 2:96-100; 5:36-37; 7:24-28; 6:22; 10:25; 15:146, 154, 168, D. Ex. 4, 13. Thus, there is constantly a massive amount of oil in the Midland tank farms. The Oklahoma Supreme Court in *Missouri Gas Energy*, under substantially similar circumstances, found that the continual presence of this massive quantity of hydrocarbons was, in itself, sufficient to establish nexus with the

taxing state. 234 P.3d at 954-57. At this Court's invitation, the Solicitor General indicated her approval of the opinion in *Missouri Gas Energy*. Brief of U. S. as *Amicus Curiae* in *Missouri Gas Energy v. Schmidt*, No. 08-1458 at 21. The Texas Supreme Court made a similar ruling regarding oil in massive amounts of inventory in *Diamond Shamrock Refining & Marketing Co. v. Nueces County Appraisal District*, 876 S.W.2d 298, 303 (Tex. 1994). The court below, however, as well as the court in *Peoples Gas* found differently. *BP America* 282 S.W.3d 215; *Peoples Gas*, 270 S.W.3d 208. Each found that, because the oil or gas was in interstate commerce, the constant presence of massive quantities of the oil or gas did not establish nexus with Texas. *BP America*, 282 S.W.3d at 224; *Peoples Gas*, 270 S.W.3d at 218-19.

But, regardless whether individual units of the oil, or any other product, may come and go with regularity, or even frequently, the constant presence of massive quantities of inventory creates a local presence of that inventory and a constant need for local government services via law enforcement, fire suppression, education of labor force, health services, and the other accoutrements of a civilized society.

If one were to examine the tank farms in Midland, or the gas field near Hallsville, or the gas field in Wood County, Oklahoma, or oil tanks in Cushing, Oklahoma, or any other hydrocarbon storage facility in this country, on any given day one would find the same thing as on every other day of the year: immense, nearly unfathomable, quantities

of oil or gas. Therein lies the difference between oil in the tanks and oil in the pipeline, the taxation of the latter of which the court below so feared. *BP America*, 282. S.W.3d at 224. The four or six inch gathering pipelines span over literally hundreds of miles with minimal quantities of oil or gas in any one spot for a considerable distance. The tank farms or gas reservoir, on the other hand, accumulate enormous quantities of toxic, flammable hydrocarbons in the space of a few hundred acres. That presence of immense quantities of oil or gas creates the need for local government services and adds to the general mass of property in the county without regard to whether any, all, or none of the oil or gas leaves the state or county. Thus, nexus to the locality should be apparent when a massive volume of any good is constantly present in a jurisdiction.

However, this Court has yet to pass on the matter of whether a massive quantity of inventory, constantly present, even though individual units come and go, is sufficient to establish nexus under *Complete Auto*. As noted, the issue is one of broad applicability and capable of frequent repetition. Indeed, there are multiple tank farms across the country (RR 3:98; 5:76-77; 7:96) and untold numbers of distribution warehouses. Regardless how this Court rules, a ruling is needed.

While this Court has not specifically ruled on that point, it has ruled on some similar points. For example, in *Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434 (1979), a Japanese company that owned a number of shipping containers used

exclusively in foreign commerce was contesting the power of California to tax those containers. While the containers' port was in Japan, the Court noted in approving the tax that there were containers in California at all times. *Id* at 445-46.

2. "In transit" is inconsequential.

Another issue which needs clarification by this Court is whether the fact that goods may be "in transit" has any efficacy in determining whether nexus exists with the taxing state under the *Complete Auto* analysis. It should be apparent under the *Complete Auto* test that whether a good is "in transit" does not in and of itself defeat the taxability of that good under the dormant Commerce Clause. The business in question in *Complete Auto* was a trucking business. Trucks are by nature "in transit." Furthermore, this Court opined in *DH Holmes* that:

> We recognized [in *Complete Auto*] that, with certain restrictions, interstate commerce may be required to pay its fair share of state taxes. Accordingly, in the present case, it makes little difference for Commerce Clause purposes whether the...[appellant's] catalogues "came to rest" in the mailboxes of its Louisiana customers or whether they were still considered in the stream of interstate commerce. This distinction may be of some importance for other purposes (in determining, for instance, whether a

> "taxable moment" has occurred . . .), but for Commerce Clause analysis it is largely irrelevant.

DH Holmes, 486 U.S. at 30-31. The Solicitor General, in her Brief of the U. S. as *Amicus Curiae* in the case of *Missouri Gas Energy v. Schmidt*, No. 08-1458, concurred and stated that whether a good is in transit has been found by this Court to be "largely irrelevant."

Admittedly, a good that is merely in transit across a state without any further connection with the state, such as a product sitting on a truck that simply rolls across the state's highways, probably has no nexus with the state. But, to claim that because a good is "in transit," it lacks nexus with the taxing state is circular logic. Unless one wants to revert to the tortured analysis of when a good comes to rest for business purposes as opposed to merely facilitate transportation, (as did the court below, *See BP America*, 282 S.W.3d at 222-23) it is probably axiomatic that a good is not in interstate commerce unless it is "in transit." Thus, to apply the "in transit" litmus test as an automatic disqualifier for nexus is to say that if a good is in interstate commerce then it has no nexus and is therefore not taxable by the situs state under the dormant Commerce Clause. Such a reading eviscerates *Complete Auto*.

Nevertheless, the courts below continue to struggle with a continued application of the "in transit" analysis, a struggle which begs for

clarification from this Court. In the decision below, the court's opinion turned on the fact that it found the oil to be "in transit." *BP America*, 282 S.W.3d at 224.

The court of appeals in *Peoples Gas* was likewise fixated on the gas in that case being "in transit." 270 S.W.3d at 215-16. Even in the correctly decided *Missouri Gas Energy* case, the Oklahoma Supreme Court labored over the relevance of the "in transit" nature of the gas, concluding that this Court had not given clear direction on the issue. 234 P.3d at 953-54. The Solicitor General, in her *amicus* brief in *Missouri Gas Energy*, as well noted the want of a definitive ruling from this Court on the matter. Brief of the U.S. as *Amicus Curiae*, No. 08-1458, at 10. Similarly, Professor Hellerstein noted this Court's lack of certain direction on the point. Jerome Hellerstein & Walter Hellerstein, *1 State Taxation* ¶ 4.13[1] (3d ed. 2010).

Other courts, even since the *DH Holmes* decision, have labored with the mistaken notion that the "in transit" status of a good renders it immune from state taxation due to the dormant Commerce Clause. Since the decisions of this Court in *Complete Auto* and in *DH Holmes*, not only have *BP America* and *Peoples Gas*, been decided, but see *Rowan Companies, Inc. v. Louisiana State Tax Commission*, 623 So.2d 159, (La. App. 1 Cir., 1993). Therein, the court opined that the Commerce Clause "prohibits taxation by the states of property which is in transit in interstate commerce." *Id.* at 162. Similarly, the court in *Pelts & Skins, L.L.C. v. Louisiana*

Department of Wildlife and Fisheries, 938 So.2d 1047 (La. App. 1 Cir. 2006) concluded that a tax on the goods in transit would likely be found to violate the commerce clause. *Id.* at 1054-55. "[T]he states may not tax property in transit in interstate commerce." *American Steamship Co. v. Limbach*, 572 N.E.2d 629, 631 (Ohio 1991). "If property is 'actually in transit' to another state, it becomes the subject of interstate commerce, and is exempt from local assessment." *Kentron, Inc. v. State Bd of Tax Com'rs*, 572 N.E.2d 1366, 1372 (Ind. Tax 1991). The "unconditional commitment of property to a common carrier for transportation in regular course to another state or country . . . place[s] it in the stream of interstate or foreign commerce, so as to render it immune from local taxation." *T. A. Operating Corp. v. State Dept. of Revenue*, 767 So.2d 1270, 1273 (Fla. App. 1 Dist. 2000). While not dealing with state taxation, *Predka v. Iowa*, 186 F.3d 1082 (8th Cir. 1999), also evinces a misunderstanding that the fact that a matter is "in transit" is determinative to invoking the Commerce Clause power reserved for the United States Congress. *Id.* at 1084.

Between the decisions of this Court in *Complete Auto* and *DH Holmes* other courts struggled with the concept of the relevance of goods being "in transit." For example, in *Chesapeake and Potomac Telephone Co. of Maryland v. Comptroller of Treasury*, 528 A.2d 536 (Md. Ct. Spec. App. 1987), while deciding in favor of the local tax, the court did so after deciding the goods were no longer in transit. *Id.* at 542-43. The same result and rationale was employed in *Sterling Custom Homes, Inc. v.*

Commissioner of Revenue, 1985 WL 6207 (Minn. Tax 1985). The Louisiana decisions of *United Gas Pipe Line Co. v. Whitman*, 390 So.2d 913 (La. Ct. App. 1980), *writ denied.*, 396 So.2d 928 (La. 1981), and *Mississippi River Transmission Co. v. Simonton*, 442 So.2d 764, 765 (La. Ct. App. 1983), *writ denied.*, 444 So.2d 1240 (La. 1984), discussed below, while reaching correct results, also resorted to pre-*Complete Auto* law, determining that the previously in transit gas had come to rest in Louisiana, and was thus no longer subject to Commerce Clause restrictions.

The Oil Companies and the court of appeals below placed extreme reliance on the "continuity of transit" test to conclude whether the oil in question was in the stream of interstate commerce and thus, erroneously, exempt from local taxation. They borrowed rationale, however, from cases decided not under the Commerce Clause, but under the Import-Export Clause, U.S. Const. art. I, §10, cl. 2. *See, Virginia Indonesia Co. v. Harris County Appraisal Dist.*, 910 S.W.2d 905, 908 (Tex. 1995) *cert. denied,* 518 U.S. 1004 (1996). However, the "continuity of transit" test still makes sense with regard to Import-Export Clause cases because the clause contains an absolute prohibition on taxation of goods in the course of export. Therefore, as this Court has recognized, the "continuity of transit" rationale still has applicability when examining goods in the stream of export, but not for examination of the taxability of goods in interstate commerce. *U.S. v. Int'l Bus. Machines Corp.*, 517 U.S. 843, 851-852 (1996).

The Import-Export Clause, U.S. Const. art. I, § 10, cl. 2, and the Export Clause, U.S. Const. art. I, § 9, cl. 5, contain similar prescriptions against all taxation, whether at the state level or the federal level. The Commerce Clause contains no such prohibition.

The court below specifically weighed the "continuity of transit" analysis as adopted by *Peoples Gas* and as considered by *Missouri Gas Energy* and elected to adopt the outdated *Peoples Gas* approach. Thus, it has added to the dichotomy of case law on the subject. That dichotomy of law, if allowed to persist, will doubtlessly spawn litigation regarding the taxability of any number of types of goods in interstate commerce. In order to resolve this issue before the confusion infects other jurisdictions, this Court should grant certiorari in both *BP America* and *Peoples Gas* and opine conclusively as only this Court can.

3. Conflicts with other states.

a. Oklahoma

As discussed above, the *Missouri Gas Energy* decision of the Oklahoma Supreme Court is in patent conflict with the court of appeals below as well as with the *Peoples Gas* opinion. In all three cases, either oil or gas, largely produced in-state, arrived by truck or pipeline at a massive depot. There it might be traded (RR 3:97; 4:38-40, 43-44, 94), and at some point will move on down the pipeline, perhaps for interstate destinations. The only factual distinction

between the *Missouri Gas Energy* case and the *Peoples Gas* case is the Red River (border between Texas and Oklahoma). And, the Oklahoma Supreme Court recognized the conflict when it specifically criticized the *Peoples Gas* decision. *Missouri Gas Energy*, 234 P.3d at 959, n.84.

This case admittedly involves oil, not gas. But, that hardly seems a fact on which to base a distinction from the *Missouri Gas Energy* decision. It is also true that some of the gas in *Missouri Gas Energy* and *Peoples Gas* stays for a longer time than the oil in Midland is likely to stay. While some gas molecules may come and go quickly, some may stay for months.

It is also true that the gas depots use the term "storage," a term eschewed by the Oil Companies and the court of appeals below, notwithstanding that the reports of the oil's location made to the state of Texas refer to the oil in tanks as in "storage" while the oil in the pipeline as in "transportation." RR P. Ex. 8; D. Ex. 3, 14, 23. And, on that supposed want of storage basis the court of appeals attempted to distinguish *Missouri Gas Energy* as well as *Diamond Shamrock. BP America*, 282 S.W.3d at 221-24. But, the distinction is illusory at best. In the first place, how long a stay constitutes "storage?" If a good is on a shelf for a day waiting delivery then it is stored for a day. The oil in *Diamond Shamrock* was considered "stored" even though it was in the tanks for only 12 to 25 days. *Diamond Shamrock*, 876 S.W.2d at 299. The gas in *Missouri Gas Energy* and *Peoples Gas* may stay for shorter or somewhat longer times. The

point is not, however, how long a particular barrel of oil or mcf of gas or widget may stay at an *entrepot*; the point is that, as explained above, there is a constant presence of the inventory on location in massive quantities. It was that fact on which the *Missouri Gas Energy* decision turned, not how long a particular molecule of gas stayed in the depot or whether the term "storage" was used.

Thus, *Missouri Gas Energy* is at odds with *BP America*. That conflict becomes all the more relevant since the oil that leaves Midland for interstate destinations is likely to go to the next major tank farm in Cushing, Oklahoma. RR 3:68-69. Thus the unresolved conflict between *Missouri Gas Energy* and *BP America* leaves the anomalous result that the oil will be tax exempt in Midland due to the alleged restraints of the Commerce Clause but taxable under the same Commerce Clause when it reaches the tanks in Cushing, Oklahoma. That is neither just, nor consistent, nor rational. Furthermore, the dichotomy lends itself to expansion as other state courts may now follow the Texas cases, noting Texas' expansive body of case law. At this point, only this Court can resolve that conflict.

In the *Missouri Gas Energy* petition for certiorari, the Solicitor General concluded that this Court should decline certiorari for two reasons. One, the Oklahoma Supreme Court ruled correctly. And, two, there was not at that point a conflict between the states. In her Brief of the U.S. as *Amicus Curiae* she noted the non-conforming opinions of the court of appeals herein and in the *Peoples Gas* case but

observed that the Supreme Court of Texas had the cases under review. Brief of U.S. as *Amicus Curiae*, *Missouri Gas Energy v. Schmidt*, No. 08-1458 at 7. Since the Texas Supreme Court denied review, the conflict now exists.

b. Mississippi

In another case irreconcilable with the decision below as well as with the decision in *Peoples Gas,* the Mississippi Supreme Court found sufficient nexus to support taxation under a Commerce Clause challenge regarding petroleum products in tanks in Mississippi which arrived in the state by pipeline, stayed less than five days, and were injected into other pipelines for distribution in and out of the state. *Murphy Oil,* 933 So.2d at 293-94. The tax at issue was a franchise tax, not an *ad valorem* tax, and was based on the sales made in Mississippi. Neither did the court address the matter of the petroleum products being "in transit." But, the case nevertheless involved nearly identical facts to this case, and resulted in a finding of nexus of the products to Mississippi to support taxation. Furthermore, all the Oil Companies sold their oil at the Midland tank farms just as Murphy sold its products at or around the tank farm in Mississippi. RR 5:73-74; 7:76-79, 84-85, D. Ex. 7, 16, 33-55, 75-94. The Mississippi court also referred to the petroleum products as being "stored" though staying for no more than five days in the tanks, a shorter time than the oil in Midland sometimes stays.

c. Louisiana

Two Louisiana decisions, discussed above, *United Gas*, 390 So.2d 913, and *Mississippi River Transmission*, 442 So.2d 764, are also factually identical to *Peoples Gas* and functionally comparable to *BP America*. In each of those cases, gas was piped in from producing fields to a storage field for later delivery out of state via pipeline. The cases were decided under archaic, pre-*Complete Auto* law, finding that the gas had come to rest in Louisiana. *United Gas*, 390 So.2d at 916-17; *Miss. River Transmission*, 442 So.2d at 770. But, the end result is that hydrocarbons in a holding facility are taxable in Louisiana, but not in Texas, with both states' courts citing to Commerce Clause rationale

d. Florida

In *Havill v. Gurley*, 382 So.2d 109 (Fla. Dist. Ct. App. 1980), the court examined whether containerized petroleum products which were brought from out of state to a warehouse in Florida, then shipped back out of state were subject to local *ad valorem* taxation under the Commerce Clause. The appellate court found that nexus existed under *Complete Auto* notwithstanding that the goods were "in transit" in interstate commerce. *Id.* at 111.

4. Activities emphasis is misplaced.

The court of appeals' opinion regarding the want of nexus is erroneous because it focuses on activity rather than property. The property tax in

question is just that: a tax on property, not a tax on activity.

The Texas court's attempt to alter the very nature of the taxes at issue recalls one of the most quotable statements ever to appear in an opinion from this Court, namely: "[a] tax on sleeping measured by the number of pairs of shoes you have in your closet is a tax on shoes." *Trinova Corp v. Michigan Department of Treasury*, 498 U.S. 358, 374 (1991) (quoting, Jenkins, *State Taxation of Interstate Commerce*, 27 Tenn. L. Rev. 239, 242 (1960)). Texas' *ad valorem* taxes are measured solely by the value of property. No amount or type activity affects the tax appraisal or the tax assessment. The taxes are exactly what they purport to be: *ad valorem* property taxes. As the Texas court admits, a substantial nexus exists for taxes of this type. As this Court has recognized, the nexus to be establish when a property tax is at issue is nexus with the property. *Polar Tankers, Inc. v. City of Valdez*, 129 S.Ct. 2277, 2284 (2009) citing *Japan Line*, 441 U.S. at 441-45.

Though not cited by the court of appeals, the emphasis on the local activities, or physical presence, of the taxpayer may be argued from *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992). Therein, the Court was considering a sales tax on goods sent by mail from out of state into North Dakota. The Court reaffirmed in *Quill* that nexus with the taxing state is established by the taxpayer's presence in the taxing state. However, *Quill* concerned a sales tax, not a property tax. Sales taxes are by nature taxes on activities, not properties. Here, as explained

above, nexus with Midland is established by the constant presence of massive quantities of oil in Midland. Thus *Quill*'s application should be limited to activities based taxes, not property taxes. Another petition now pending before this Court, Petition for Writ of Certiorari, *Ashworth L.L.C. v. Department of Revenue, Finance Administration Cabinet, Commonwealth of Kentucky*, No. 10-662, raises this same issue with regard to income taxes. Again, that dichotomy cries for this Court's clarification.

However, even if the court of appeals had properly focused on the activities of the oil companies, it should have, nevertheless, found nexus. The District will defer till later further briefing on that point, however.

5. Scholarly treatise finds fault with *BP America*

One of the foremost resources on state taxation is the treatise by Jerome and Walter Hellerstein. Recently, the treatise noted the poor logic of the court below, commenting on the *BP America* case as follows:

> Although the Oklahoma court's opinion [*Missouri Gas Energy*] reflects the better view of the current state of the law regarding taxes on goods in transit than that reflected in the Texas case [*Peoples Gas*], a subsequent Texas decision [*BP America*] followed the Texas precedent in embracing an

> earlier view of the Commerce Clause restraints . . .
>
> ...the subsequent Texas decision did attempt to reconcile its decision with the Oklahoma decision . . . But the very distinction the Texas court drew reveals the weakness of its reasoning.
>
> The Texas court then went on to find that the *ad valorem* property tax on oil in the county tank farm failed *Complete Auto's* 'substantial nexus' test, because the oil was in transit, a position that seems flatly inconsistent with the U.S. Supreme Court's decision in [*DH*] *Holmes*.
>
> As a practical matter of course, taxing 100% of the oil located in the tank farm on January 1 would result in a fair portion if, as the evidence in the case suggested, 'there is a substantial quantity of the oil that is constantly present in the tanks . . .'

Jerome Hellerstein & Walter Hellerstein, *1 State Taxation* ¶ 4.13[3][a] (3d ed. 2010).

The treatise was equally critical of the court of appeals' decision in *Peoples Gas*. That the treatise is a recognized authority is beyond doubt. It has been cited by this Court with approval on multiple occasions. *See, e.g., MeadWestvaco Corp. v. Ill. Dept.*

of Revenue, 553 U.S. 16, 25 (2008); *Lunding v. N.Y. Tax Appeals Tribunal*, 522 U.S. 287, 321 (1998); *Okla. Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450, 463 (1995).

6. Nexus from the ground.

The oil this case patently has nexus with the State of Texas. As was noted in the opinion below, it was produced from the ground in Texas. *BP America*, 282 S.W.3d at 219. In fact, the court of appeals even admitted that the oil had nexus with Texas, acknowledging its production in Texas, but concluded that the "activity" being taxed was the ownership of the oil. *Id.* at 224. That is a particularly illogical rationale for at least two reasons. One is that Texas does not levy an *ad valorem* tax on the "activity" of "ownership" but rather on property. *See* Tex. Tax Code § 11.01. That is the nature of any *ad valorem* tax. Second, this Court has recognized that nexus is established with a taxing state by the nature of the presence of the property being taxed. For example, in *Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 617-18 (1981), the court found sufficient nexus between Montana and coal mined there to support a tax thereon, notwithstanding that over 90% of the coal was bound for delivery out of the state.

B. *Complete Auto* is completely met.

Though not addressed by the court of appeals, the tax at issue herein also meets the other three prongs of *Complete Auto*.

First, it is clear that the tax is fairly apportioned, since it only applies to oil that is actually in the tank farms in Midland on the assessment date of January 1. For that same reason, there is no danger of multiple taxation of oil as the court of appeals worried, because the oil, by definition, can only be in one place at one time. Given the January 1 tax assessment date, the oil taxed in Midland is only in Midland.

Furthermore, the tax plainly does not discriminate against interstate commerce. It applies to any and all inventories.

Finally, the tax in question is patently fairly related to the services provided by the state. Extensive testimony at trial indicated that fire, police, law enforcement, health services, and education were provided to the tank farms and those employed in operating them. RR 5:51-54; 6:79-84; 10:66-109. Furthermore, in view of the events of recent months it would be laughable, were it not so serious, to contend that a company like BP America could not experience some accident with its oil that might cause extensive damage requiring the response of local government.[2] And, that the tanks are assessed with property taxes is irrelevant. Empty tanks demand very little in the way of public services. It is the oil in them that creates the need for multiple public services.

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[2] For an example of what can happen to a tank farm see: YouTube, http://www youtube.com/watch?v=NVzxohzcn18 (last visited Dec. 9, 2010)

III. No independent state law ground exists.

The Oil Companies may argue to this Court that the court of appeals' decision was supported by an adequate state law ground such as to defeat jurisdiction in this Court. After finding the tax invalid under the dormant Commerce Clause, the court of appeals found that because the oil was only temporarily in Midland County, being in interstate commerce, it established no situs for taxation there pursuant to Tex. Tax Code § 21.02. *America* at 224-225. The text of the statute is at Appendix E.

The issue is, of course, governed by this Court's decision in *Michigan v. Long*, 463 U.S. 1032 (1983). Therein, this Court held that it would presume jurisdiction unless the state court opinion plainly states "that it is based on a bona fide separate, adequate, and independent grounds." *Id.* at 1040-1041.

A. The putative state law ground is not adequate.

Texas' jurisdiction to tax is necessarily co-extensive with the power to tax allowed under the federal Constitution. The Texas Constitution mandates that all property be taxed which the state has the power to tax under its own or the federal Constitution. Tex. Const., Art. VIII, § 2; *Dallas County Appraisal Dist. v. L.D. Brinkman & Co., Inc.*, 701 S.W.2d 20, 23 (Tex. App.—Dallas 1985, writ ref'd n.r.e.). Thus, a reversal on the federal grounds

necessitates a reversal on the state law grounds as well, whether under § 11.01 or § 21.02.

B. The court of appeal's ruling on § 21.02 is not independent of its holding on the dormant Commerce Clause.

If the constant presence of a massive quantity of inventory is sufficient to establish nexus with the taxing state under *Complete Auto*, it is more than sufficient to establish situs in Midland County. In other words, if the proper focus for the Court's examination is the constantly present massive inventory of oil, as opposed to the individual barrels that come and go frequently, both nexus and situs are apparent. After all, it is uncontested that the immense quantities of oil are located in no other place than Midland County. That is where the tank farms are.

Under § 21.02 there is situs to tax locally if the property is present more than a temporary period of time. The same standard applies to jurisdiction to tax under Tex. Tax Code § 11.01 which, though not cited by the court of appeals, was cited by the trial court. If the massive quantities of oil that are constantly present, though the constituent units thereof come and go, establish nexus, the same fact indicates that the oil is present for more than a temporary period of time in Midland. And, the Texas Supreme Court has so found. *Diamond Shamrock*, 876 S.W.2d at 303.

Before reaching § 21.02, the court below first found distinction in two cases establishing situs for oil in tanks under virtually identical circumstances by noting that this oil was bound for interstate commerce and thus in transit in interstate commerce while the oil in the other cases was not. *BP America*, 282 S.W.3d at 222. Only after finding that the dormant Commerce Clause exempted the oil from taxation did it proceed to § 21.02. As such, the putative state grounds are so interwoven with the federal issue as to be indistinguishable. As this Court has held, "where the non-federal ground is so interwoven with the [federal ground] as not to be an independent matter, or is not of sufficient breadth to sustain the judgment without any decision of the other, our jurisdiction is plain." *Enterprise Irrigation Dist. v. Farmers' Mutual Canal Co.*, 243 U.S. 157, 164 (1917).

The legal underpinnings of situs are founded in the Due Process Clause, U.S. Const. amend. XIV, § 1, not the dormant Commerce Clause. *See, Quill Corp. v. N.D.*, 504 U.S. 298, 312 (1992); *Braniff Airways, Inc. v. Neb. State Bd. of Equalization & Assessment*, 347 U.S. 590, 598-599 (1957); *Miller Brothers Co. v. Md.*, 347 U.S. 340, 344-345 (1954). Of the two Constitutional provisions, the Commerce Clause is the more stringent. *See, Quill Corp.*, 504 U.S. at 312-313; *Tax Comm'r of W. Va v. MBNA America Bank*, 640 S.E.2d. 226, 235 (W. Va. 2006); Jerome Hellerstein & Walter Hellerstein, *1 State Taxation* ¶ 6.02 (3d ed. 2010). Thus, a tax that meets the scrutiny of the Commerce Clause will also meet scrutiny under the Due Process Clause

C. There is no plain statement of independent reliance on a state law ground.

The court of appeals' logic in its § 21.02 ruling was premised on its finding that the oil was protected by the dormant Commerce Clause from taxation. After spending nearly the entirety of its opinion discussing the dormant Commerce Clause, it dispatched the § 21.02 argument in two paragraphs without citing any supporting state cases. *BP America*, 282 S.W.3d at 224-225. Its two paragraphs are laced with reference to the oil being in interstate commerce and having no nexus with Texas or Midland County. The opinion never states that its ruling under § 21.02 is an independent ground.

D. The putative state law ground is not a bona- fide issue.

A court should always rule first on narrow issues and state issues before federal Constitutional issues. *Massachusetts v. Upton*, 466 U.S. 727, 735-737 (1984) (Stevens, J. concurring). The court below clearly premised its judgment on the federal dormant Commerce Clause issue. It appends its ruling on § 21.02 as a virtual afterthought, that is explicitly dependent on its finding of want of nexus. *BP America*, 282 S.W.3d at 225.

CONCLUSION AND PRAYER

The District prays that this Court grant writ of certiorari.

Respectfully submitted,

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APPENDICES

APPENDIX A.
Midland Central Appraisal District v. BP America et al , No. 11-00048 Opinion (11th District Ct. App. Mar. 26, 2009)

IN THE ELEVENTH COURT OF APPEALS AT EASTLAND, TEXAS
[Filed March 26, 2009]

Case No. 07-00048
TC# CV44864 (Consolidated)

MIDLAND CENTRAL APPRAISAL DISTRICT,
Appellant/Cross-Appellee,
v.
BP AMERICA PRODUCTION COMPANY ET AL.
Appellees/Cross-Appellants.

Appeal from the District Court of
Midland County, Texas
John Hyde, District Judge, Presiding

Agued and Submitted
November 6, 2008—Eastland, Texas

Filed March 26, 2009

Before: Justice Wright, Justice McCall, and Justice Strange

Opinion by Chief Justice Jim R. Wright

COUNSEL

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OPINION

The issue in this case is whether an *ad valorem* tax may be imposed on crude oil located in Midland County in a tank farm that is an integral part of an interstate, common carrier pipeline system. In its appraisal rolls for 2003 and 2004, Midland Central Appraisal District (MCAD) included oil located in the tank farm on January 1 of the respective years. MCAD allocated ownership of the oil to various shippers, including BP America Production Company; Amerada Hess Trading Company; Chevron USA, Inc.; ChevronTexaco Products Company; ChevronTexaco Global Supply and

Trading Company; TEPPCO Crude Oil LLC; and TEPPCO Crude P/L LLC (hereinafter referred to collectively as the Oil Companies). The Oil Companies properly protested and ultimately brought four separate suits in district court. After consolidating the suits and conducting a nonjury trial, the trial court rendered judgment that the oil was not taxable but denied the Oil Companies' request for attorney's fees. MCAD appeals the trial court's ruling regarding the taxability of the oil, and the Oil Companies appeal the denial of attorney's fees. We affirm.

I. *Issues*

MCAD presents six issues for review. In the first issue, MCAD contends that the trial court erred as a matter of law in determining that the oil is not taxable in Midland County. In the second issue, MCAD contends that the trial court erred in finding that oil had no situs in Midland County. In the third issue, MCAD contends that the trial court erred in holding that the oil was in interstate commerce. In its fourth issue, MCAD challenges the legal and factual sufficiency of several findings of fact and asserts that the trial court erred in considering the oil as individual barrels rather than an aggregate inventory. MCAD argues in its fifth issue that the trial court erred in finding that the tax is not applied to an activity or oil with a substantial nexus to Texas. In its final issue, MCAD asserts that the trial court erred in finding that MCAD's allocation of ownership of the oil was not reasonable.

The Oil Companies present two issues for review. In their first issue, the Oil Companies contend that the trial court erred in denying their request for attorney's fees because the award of attorney's fees was mandated by statute, specifically TEX. TAX CODE ANN. § 42.29 (Vernon 2008). In their second issue, the Oil Companies assert that MCAD waived its challenge to the award of attorney's fees by requesting findings of fact that support the award.

II. *Background Facts*

The record shows that the underlying facts in this case are largely undisputed. ***219** The unchallenged findings of fact indicate that oil at issue in this case was produced mostly in West Texas and a small amount in eastern New Mexico and was injected into the Midland Pipeline System, a spiderweb configuration of interconnecting pipelines covering more than two dozen counties in West Texas and eastern New Mexico. The Midland Pipeline System is an interstate, common carrier pipeline system that is regulated by the Federal Energy Regulatory Commission and is operated by various pipeline companies that are not parties to these proceedings. Upon injection of the subject oil into a pipeline, control and custody was relinquished to the pipeline companies; the oil, being fungible, became part of the common stream of oil.

Oil in the system travels through pipelines in Texas, taking no more than two and one-half weeks, to final destinations at various oil refineries located

in Texas and in other states. During the journey, a large amount of oil passes through the tank farm where the Midland Pipeline System converges. The tank farm functions as an integral part of the Midland Pipeline System and exists to facilitate the transportation of the oil, not to store oil. The oil in the tank farm arrives and exits via the Midland Pipeline System. The time from entry into a tank to exit from a tank is six to seventy-two hours. However, a certain minimum volume of cushion oil is required to be maintained in each tank for safety reasons and to meet emission standards, resulting in the constant presence of a large amount of oil in the tank farm. Blending, batching, or staging of the oil may occur at the tank farm as necessary to facilitate the transmission of the oil through the Midland Pipeline System, but these processes do not interrupt the continuity of transit. The tanks are not used for storage.

Oil is bought, sold, and traded by document transfers irrespective of where the oil may be in the system. These transfers do not alter the movement of the oil or interrupt its in-transit movement to refineries. Upon arrival at a refinery, the oil is assessed and listed for taxation by the local appraisal authorities.[3] Furthermore, *ad valorem* taxes are assessed on the pipelines, tanks, physical assets, and equipment at the tank farm. In 2003 and 2004, those *ad valorem* taxes were timely paid.

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[3] We note also that a production tax is levied on oil that is produced in Texas. TEX TAX CODE ANN. §202 051 (Vernon 2008)

III. *MCAD's Appeal*

A. Sufficiency of the Challenged Findings.

MCAD challenges several of the trial court's findings regarding the temporariness of the oil in Midland County and in Texas, the continuity of the oil's transit, the ultimate destination of the oil, and the oil's status as being in interstate commerce. MCAD argues in its fourth issue that there is no evidence to support the challenged findings and that the evidence is factually insufficient to support those findings. MCAD also argues in its fourth issue that the trial court erred in considering the oil as individual barrels of oil rather than an oil inventory.

We review sufficiency challenges to a trial court's findings of fact under the same standards that we use to review a jury's findings. *Catalina v. Blasdel,* 881 S.W.2d 295, 297 (Tex.1994); *Anderson v. City of Seven Points,* 806 S.W.2d 791, 794 (Tex.1991). In analyzing a legal sufficiency challenge, we must determine whether the evidence at trial would enable reasonable and fair-minded people to reach the ***220** verdict under review. *City of Keller v. Wilson,* 168 S.W.3d 802, 827 (Tex.2005). We must review the evidence in the light most favorable to the challenged finding, crediting any favorable evidence if a reasonable factfinder could and disregarding any contrary evidence unless a reasonable factfinder could not. *Id.* at 821-22, 827. We may sustain a no-evidence or legal sufficiency challenge only when (1) the record discloses a complete absence of a vital

fact, (2) the court is barred by rules of law or evidence from giving weight to the only evidence offered to prove a vital fact, (3) the only evidence offered to prove a vital fact is no more than a mere scintilla, or (4) the evidence conclusively establishes the opposite of a vital fact. *Id.* at 810 (citing Robert W. Calvert, *"No Evidence " and "Insufficient Evidence" Points of Error,* 38 TEX. L.REV. 361, 362-63 (1960)). In analyzing a factual sufficiency challenge, we must consider and weigh all of the evidence and determine whether the evidence in support of a finding is so weak as to be clearly wrong and unjust or whether the finding is so against the great weight and preponderance of the evidence as to be clearly wrong and manifestly unjust. *Dow Chem. Co. v. Francis,* 46 S.W.3d 237, 242 (Tex.2001); *Pool v. Ford Motor Co.,* 715 S.W.2d 629, 635 (Tex.1986); *In re King's Estate,* 150 Tex. 662, 244 S.W.2d 660, 661 (1951). We review a trial court's conclusions of law, including those mislabeled as findings of fact, de novo. *See BMC Software Belgium, N.V. v. Marchand,* 83 S.W.3d 789, 794 (Tex.2002).

At trial, several witnesses, including employees of the pipeline companies, explained that a tank is basically a wide spot in a pipeline and that the tank farm is simply a gathering location of multiple pipelines that bring barrels of oil in at varying rates and varying pressures and allows the oil to be gathered to move on to the next destination. The Oil Companies are not allowed to store oil in the pipeline system. The oil in the tanks is in constant movement: either filling or withdrawing. After reviewing all the evidence, we hold that, although

there is a substantial quantity of oil that is constantly present in the tanks, the trial court's findings regarding the continuity of the oil's transit are supported by legally and factually sufficient evidence.

MCAD also challenges findings regarding the ultimate destination of the oil and the oil's status as being in the stream of interstate commerce. The trial court found that a vast majority of the oil located in the tank farm is sent to refineries located outside of Texas and that less than ten percent of the oil remains in Texas. These findings are supported by testimony showing that the oil passing through the tank farm travels through the pipeline system and can be offloaded at only three refineries in Texas. Testimony showed that the amount of oil offloaded at these three refineries amounts to less than ten percent of the oil that passes through the tank farm in the pipeline system and that "the rest of the oil has to leave the state." After reviewing all of the evidence, we hold that the challenged findings of fact are supported by legally and factually sufficient evidence. To the extent that MCAD's fourth issue challenges the sufficiency of the evidence, it is overruled.

B. Was the Oil Taxable in Midland County?

Unless exempt by law, tangible personal property in Texas is taxable if it is located in Texas for longer than a temporary period, is temporarily located outside Texas but the owner resides in

Texas, or is used continually in Texas. TEX. TAX CODE ANN. § 11.01 (Vernon 2008); *see also* TEX. TAX CODE ANN. § 21.02 (Vernon 2008) (taxable situs in taxing unit). In determining ***221** whether the oil at issue in this case was taxable, we address whether the oil was in the stream of interstate commerce, whether the trial court erred in failing to consider the oil as a constant presence in the tanks rather than individual barrels in transit, and whether the oil had situs in Midland County. We ultimately conclude that the tax violated the Commerce Clause of the United States Constitution, U.S. CONST. art. I, § 8, cl. 3, and that the tax was not valid under Section 21.02(a)(1) due to the temporary period during which the oil was located in Midland County.

1. Interstate Commerce.

The first question is whether the oil had been placed into the stream of interstate commerce. MCAD argues that it had not. Interstate commerce "occurs when goods 'have been shipped, or entered with a common carrier for transportation to another State, or have been started upon such transportation in a continuous route or journey.' " *Va. Indon. Co. v. Harris County Appraisal Dist.*, 910 S.W.2d 905, 908 (Tex.1995) (*VICO*) (citing *Coe v. Errol*, 116 U.S. 517, 527, 6 S.Ct. 475, 29 L.Ed. 715 (1886)).

The trial court found and the uncontroverted evidence indicates that, prior to making its way to the tank farm, the subject oil was injected into a federally regulated, interstate common carrier

pipeline system. Once injected, the oil remained in the pipeline and under the pipeline's control until it reached its ultimate destination, a refinery. The evidence also shows that the tanks in the tank farm are and were an integral part of the interstate pipeline system and that, although the destination of the oil actually in the tanks at the time of the assessment could not be determined, over ninety percent of the oil passing through the tank farm was transported to refineries out of state. *See Eureka Pipe Line Co. v. Hallanan*, 257 U.S. 265, 272, 42 S.Ct. 101, 66 L.Ed. 227 (1921) (stating that a tank in an oil pipeline "may be regarded as a pipe of larger size").

The next question is whether the oil remained in transit in the stream of interstate commerce when it was at the tank farm. MCAD asserts that the subject oil should be viewed as a massive constant presence of oil in the tank farm and that, if so viewed, it cannot be concluded that the oil was in interstate commerce or that it was only temporarily in Midland County. In support of this contention, MCAD relies upon *Diamond Shamrock Refining and Marketing Co. v. Nueces County Appraisal District*, 876 S.W.2d 298 (Tex.1994), and *Exxon Corp. v. San Patricio County Appraisal District*, 822 S.W.2d 269 (Tex.App.-Corpus Christi 1991, writ denied). We find these cases to be factually distinguishable.

In *Diamond Shamrock*, the supreme court held that oil stored in tanks was subject to an *ad valorem* tax where the oil was imported from abroad into Texas, which was its final destination. 876

S.W.2d 298. Upon arriving in Texas, the oil, which was owned by Diamond Shamrock and destined for Diamond Shamrock's refinery in Texas, was offloaded into a storage facility and stored in tanks before being transported to a refinery in another county by pipeline. Although the parties stipulated that the oil at issue was "in transit," the court determined that the situs of each barrel should not be considered because the incidence of the tax imposed was the year-round presence in the storage facility of a large volume of oil belonging to Diamond Shamrock. *Id.* at 300-04. The court in *Diamond Shamrock* specifically limited its holding to foreign goods in transit through only one state that remain in that state. *Id.* at 302, n. 7. Furthermore, the oil at issue in *Diamond Shamrock* ***222** was located in a storage facility, whereas the oil at issue in this case had been injected into interstate common carrier pipelines and was located in tanks that were an integral part of the common carrier pipeline system within the stream of interstate commerce. Even when viewed as a constant presence, the oil at issue in this case, like the massive quantity of oil constantly present within the pipelines themselves, was located in the stream of interstate commerce where it had been commingled with oil from numerous other shippers and was-for the most part-being transported to another state.

In *Exxon,* as in the present case, oil that was located in working tanks was taxed. 822 S.W.2d 269. The court ruled that, although each individual barrel remained in the county for no longer than seventeen days, the oil acquired situs there because Exxon

maintained at all times a massive quantity of oil in the tanks. *Id.* at 272-74. As in *Diamond Shamrock*, however, the oil in *Exxon* was not destined for any location outside the State of Texas. The oil at issue in *Exxon* was transported, refined, and sold in Texas. *Id.* at 272. Nothing in the court's opinion in *Exxon* indicates that interstate commerce was involved.

Subsequent to its opinion in *Diamond Shamrock*, the Texas Supreme Court considered and struck down an *ad valorem* tax assessed on goods that had been placed into the export stream of commerce but were temporarily located in a facility belonging to an independent export packer. *VICO*, 910 S.W.2d at 906-08. Although the court in *VICO* relied upon the Import-Export Clause, U.S. CONST. art. I, § 10, rather than the Commerce Clause to invalidate the tax, the court recognized that the doctrine used to determine whether goods are in transit at the time of taxation applies equally under either clause. *Id.* at 908 & n. 1. The court recognized the year-round presence in the packer's facility of goods belonging to VICO but did not rely on the goods' constant presence as a factor in its determination that the goods remained in transit and in the stream of export. *Id.* at 907-14.

In *VICO*, the goods had been committed to foreign export and were transported to the packer's facility to be checked, approved for import into Indonesia, inspected, packaged, and cleared for shipping. *Id.* at 907, 913-14. The court held that the temporary stoppage of the goods at the packer's facility, which usually took no more than forty-five

days, did not break the continuity of transit and that the goods remained in the stream of export. *Id.* at 907, 912-14. In determining whether the stoppage disrupted the continuity of transit, the court in *VICO* followed Supreme Court precedent and reasoned that it "is the *purpose* of the stoppage that is important." *Id.* at 912 (citing *Champlain Realty Co. v. Town of Brattleboro,* 260 U.S. 366, 376-77, 43 S.Ct. 146, 67 L.Ed. 309 (1922), and *Minnesota v. Blasius,* 290 U.S. 1, 11-12, 54 S.Ct. 34, 78 L.Ed. 131 (1933)). When the stoppage is attributable to a business purpose of the owner, the in-transit status is deemed to have terminated, and the goods are subject to taxation in the jurisdiction where they are stopped. *Id.* In contrast, if the stoppage is a necessity of the journey or for the purpose of safety and convenience in the course of the journey, the stoppage does not interrupt the continuity of transit. *Id.*

In the present case, the "stoppage" was not related to a business purpose of the owner. The evidence and the trial court's findings indicate that, barring any malfunction, oil is delayed for six to seventy-two hours in the tank farm for purposes related to the operation of the pipeline system. Each tank is required to maintain ***223** 8,000 to 10,000 barrels of oil as a cushion for safety and emission reasons. Oil may also be delayed for blending, batching, or staging-operational functions of the pipeline system that are necessary to facilitate the

transmission of the oil.[4] Thus, as in *VICO*, the "stoppage" of the oil did not interrupt the continuity of transit.

We hold that the trial court correctly determined that the oil was in the stream of interstate commerce. The oil had been injected into a common carrier pipeline system and remained in that interstate system at the time of the tax assessment. Any delay at the tank farm was not attributable to the Oil Companies but, rather, was incidental to the transportation of the oil by the common carrier and was necessary for the safe and efficient operation of the pipeline system.

2. Validity of Tax Under Commerce Clause.

Next, we must determine whether the tax on the oil in interstate transit violated the Commerce Clause. The Commerce Clause grants Congress the power to regulate interstate commerce and implicitly prohibits certain state regulation of interstate commercial activity. *Okla. Tax Comm'n v. Jefferson Lines, Inc.*, 514 U.S. 175, 115 S.Ct. 1331, 131 L.Ed.2d 261 (1995). However, not all state taxes on interstate commerce are prohibited. *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 97 S.Ct. 1076, 51 L.Ed.2d 326 (1977). Pursuant to *Complete Auto*, a

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[4] Blending is the mixing of oil of low sulfur content (sweet crude) with oil of higher sulfur content (sour crude) Batching keeps oil of different grades separate Staging is the accumulation of sufficient volumes of oil necessary for transmission in the pipeline system.

state tax does not violate the Commerce Clause if it meets a four-pronged test set out by the Court. To be valid, the tax must (1) apply to an activity with a substantial nexus with the taxing state, (2) be fairly apportioned, (3) not discriminate against interstate commerce, and (4) be fairly related to the services provided by the state. *Id.* at 279, 287, 97 S.Ct. 1076; *Vinmar, Inc. v. Harris County Appraisal Dist.*, 947 S.W.2d 554, 555 (Tex.1997). To establish that a state tax is unconstitutional, the taxpayer need only prove that the tax fails one prong of the *Complete Auto* test. *Vinmar,* 947 S.W.2d at 555.

The trial court concluded that the tax violated the Commerce Clause and that the tax did not satisfy the "substantial nexus" requirement of the *Complete Auto* test. The substantial nexus requirement of *Complete Auto* is a means for limiting state burdens on interstate commerce. *Quill Corp. v. North Dakota,* 504 U.S. 298, 313, 112 S.Ct. 1904, 119 L.Ed.2d 91 (1992).

In support of their contention regarding substantial nexus, the Oil Companies cite to a recent opinion of the Texarkana Court of Appeals, *Peoples Gas, Light, & Coke Co. v. Harrison Central Appraisal District,* 270 S.W.3d 208 (Tex.App.-Texarkana 2008, pets. filed). In *Peoples,* the court struck down an *ad valorem* tax assessed against the owner of natural gas on gas that had been placed into the stream of interstate commerce and was located in an underground storage facility owned by an interstate pipeline company. The court determined that the tax violated the Commerce

Clause because the gas owner's activities in Texas and its connection to Texas were too tenuous to create a substantial nexus. 270 S.W.3d at 218.

In contrast, MCAD asserts that we should not follow *Peoples* but should instead follow the decision reached by the Supreme Court of Oklahoma in *In re Assessment of Personal Property Taxes Against Missouri Gas Energy, a Division* ***224** *of Southern Union Co.*, No. 103,355, 2008 WL 4648330 (Okla. Oct.21, 2008). In *Missouri Gas*, the court upheld an *ad valorem* tax on gas held in an underground storage facility owned and operated by an interstate, common carrier pipeline. Missouri Gas Energy owned the gas, which was ultimately transported out of state. The Oklahoma court determined that the gas was not merely passing through the county to an out-of-state destination because the large volumes of gas that were stored in the facility for a substantial part of the year were "not in transit in such a way as to invoke the protection of the Commerce Clause." 2008 WL 4648330, at *11.

We find at least one crucial fact of *Missouri Gas* to be distinguishable from the facts of the present case. The crude oil in the present case was not in storage but, rather, was in transit in the stream of interstate commerce. For this same reason, the case at hand presents an even stronger case for a Commerce Clause violation than did the circumstances in *Peoples*.

To comply with the first prong of the *Complete Auto* test, the *ad valorem* tax on the oil in the tank farm must have applied to an activity with a

substantial nexus with Texas. Although the oil itself had a substantial nexus with this state as much of it was produced in this state and some of it was destined for an in-state refinery, the "activity" being taxed had no such nexus. The activity essentially being taxed in this case was the ownership of oil that was present but in transit on January 1 in a tank farm that constituted an integral part of an interstate, common carrier pipeline system.

Furthermore, if the tax in this case is upheld, then *ad valorem* taxes could potentially be levied by any taxing authority on oil in transit but located, at the time of assessment, in the portion of an interstate pipeline system within the boundaries of that taxing authority. The result would be an impermissible multiple burden on interstate commerce. *See Michigan-Wisconsin Pipe Line Co. v. Calvert,* 347 U.S. 157, 170, 74 S.Ct. 396, 98 L.Ed. 583 (1954) (holding that tax on taking of gas into interstate pipeline infringed upon the Commerce Clause and recognizing that such tax would permit a multiple burden upon commerce because other states could impose a tax on the first taking of the same gas in their state). We hold that the tax in the present case does not satisfy the *Complete Auto* test and that it runs afoul of the Commerce Clause.

3. Validity of Tax Pursuant to State Law.

Section 21.02 provides in relevant part that tangible property in Texas is taxable by a taxing unit if "it is located in the unit on January 1 for more

than a temporary period." Section 21.02(a)(1).3 The trial court concluded that the oil was not located in Midland County for longer than a temporary period. We agree.

As discussed above, the record shows that the oil had been injected into an interstate, common carrier pipeline system; ***225** that the oil merely traveled through Midland County in the pipeline system; that any delay of the oil in the tank farm was temporary and was necessary only to facilitate the continued transportation of the oil; and that the tank farm was not used for storage. Although much of the oil had a nexus with Texas in that it was produced in Texas, it had no such nexus with Midland County. The oil was merely transported through Midland County and was only temporarily located in the county. Thus, we hold that the trial court did not err in concluding that the oil had no taxable situs in Midland County.

The tax was not valid under the Commerce Clause or Section 21.02(a)(1). Consequently, MCAD's first, second, third, fourth, and fifth issues are overruled. We need not reach MCAD's sixth issue concerning allocation of ownership. TEX.R.APP. P. 47.1.

IV. *Oil Companies' Appeal*

The Oil Companies appeal the trial court's refusal to award them attorney's fees. In Texas, attorney's fees are recoverable from an opposing party only when authorized by statute or by contract

between the parties. *Travelers Indem. Co. of Conn. v. Mayfield,* 923 S.W.2d 590, 593 (Tex.1996). The Oil Companies assert that attorney's fees were authorized by Section 42.29 of the Tax Code. The trial court entered findings of fact as to the amount of attorney's fees that would be reasonable if recoverable under Section 42.29. The trial court concluded, however, that the Oil Companies were not entitled to attorney's fees under Section 42.29.

Section 42.29 provides that a "property owner who prevails in an appeal to the court under Section 42.25 or 42.26 may be awarded reasonable attorney's fees." TEX. TAX CODE ANN. § 42.25 (Vernon 2008) provides a remedy for an excessive appraisal, entitling the owner to a reduction of the appraised value on the appraisal roll. TEX TAX CODE ANN. § 42.26 (Vernon 2008) provides a remedy for the unequal appraisal of property in relation to the appraised values of other properties. Sections 42.25 and 42.26 do not apply to this case because the Oil Companies did not challenge the appraised value of the oil; they challenged the ability of Midland County to tax the oil. Consequently, since the Oil Companies did not prevail on a claim "under Section 42.25 or 42.26," attorney's fees were not authorized by Section 42.29. If the legislature had intended for attorney's fees to be recoverable in a case of this type, it could have included in its Section 42.29 authorization of attorney's fees an appeal challenging the inclusion of the property on the appraisal roll, the determination of ownership, or the denial of an exemption. The legislature specifically authorized such protests in TEX. TAX CODE ANN. §

41.41(a) (Vernon 2008) (listing nine distinct actions that may be protested by taxpayer, including: excessive value, unequal appraisal, denial of an exemption, ownership, and inclusion on tax roll). The legislature, however, did not authorize attorney's fees for all such protests. Section 42.29 authorizes attorney's fees for only two distinct types of protest: excessive value and unequal appraisal. *Dallas Cent. Appraisal Dist. v. Seven Inv. Co.*, 835 S.W.2d 75, 77-79 (Tex.1992). The Oil Companies' protest cannot be categorized as falling within either of those two. *See id.* The Oil Companies' first issue is overruled.

In the second issue, the Oil Companies assert that MCAD waived any complaint it had to the award of attorney's fees by requesting findings of fact that supported an award of attorney's fees. We disagree. MCAD repeatedly objected to issues related to the prospective award ***226** of attorney's fees, and MCAD did not request any findings of fact that would entitle the Oil Companies to attorney's fees or waive MCAD's objection to such fees. MCAD merely requested that the trial court amend its findings regarding attorney's fees to omit the phrase "recoverable under Tax Code § 42.29." The requested amendments reflected MCAD's continued objection to the award of attorney's fees and continued contention that the fees were not "recoverable." Moreover, MCAD did not ask the trial court to amend Conclusion of Law No. 9, wherein the trial court concluded: "The Oil Companies are not entitled to attorney's fees under Tax Code § 42.29." MCAD did not waive its complaint to the award of attorney's fees. The Oil Companies' second issue is

overruled.

V. *Conclusion*

The judgment of the trial court is affirmed.

JIM R. WRIGHT
CHIEF JUSTICE

March 26, 2009

Panel Consists of: Wright, J.J.,
McCall, Jr., and Strange, J.

APPENDIX B:
Midland Central Appraisal District v. BP America et al., No. 09-0273 Order Denying Petition for Review (Tex. Sup.Ct. Mar. 12, 2010)

IN THE SUPREME COURT OF TEXAS
[Filed March 12, 2010]

Case No. 09-0273
COA#11-07-00048-CV
TC# CV44864 (Consolidated)

MIDLAND CENTRAL APPRAISAL DISTRICT,
Petitioner,
V.
BP AMERICA PRODUCTION COMPANY ET AL.
Respondents.

ORDER DENYING PETITION FOR REVIEW

Today the Supreme Court of Texas denied the petition for review in the above-referenced case.

APPENDIX C:
Midland Central Appraisal District v. BP America et al., No. 09-0273 Order Denying Motion for Rehearing (Tex. Sup. Ct. Oct. 1, 2010)

IN THE SUPREME COURT OF TEXAS
[Filed October 1, 2010]

Case No. 09-0273
COA#11-07-00048-CV
TC# CV44864 (Consolidated)

MIDLAND CENTRAL APPRAISAL DISTRICT,
Petitioner,
v.
BP AMERICA PRODUCTION COMPANY ET AL.
Respondents.

ORDER DENYING MOTION FOR REHEARING

Today the Supreme Court of Texas denied the motion for rehearing of the above-referenced petition for review.

APPENDIX D:
BP America et al., v. *Midland Central Appraisal District* No. CV-44864 (Consolidated) Findings of Fact (238th Dist. Ct. Jan. 23, 2007)

IN THE DISTRICT COURT OF
MIDLAND COUNTY STATE OF TEXAS
[Filed January 23, 2007]

Case No. CV-44864 (Consolidated)

BP AMERICA PRODUCTION COMPANY ET AL.
Plaintiffs,
V.

MIDLAND CENTRAL APPRAISAL DISTRICT,
Defendant.

FINDINGS OF FACT

1. The property at issue ("subject oil") is all crude oil located in the tank farms in Midland County ("Midland Tank farm") listed on the Midland Central Appraisal District's Appraisal roll for tax years 2003 and 2004 in the Plaintiffs' ("Oil Companies") names.

2. The Oil Companies are shippers who move oil from a receipt point to a delivery point.

3. The pipeline systems through which the subject oil flowed are the Plains Pipeline System, the Mobil//Centurion Pipeline System, the Teppco Crude Pipeline System and the Chevron mesa Pipe Line System (Collectively "Midland Pipeline System").

4. Before tax year 2003, the Midland Central Appraisal District ("MCAD") did not list or appraise the Oil Companies' oil, located in the Midland Pipeline System or in its tank farms.

5. The Midland Pipeline System is a spider web configuration of interconnecting pipelines covering more than two dozen counties in West Texas and Eastern New Mexico.

6. The Midland Pipeline System through which the subject oil flowed is an interstate FERC-regulated, common carrier pipeline system.

7. The majority of the subject oil is produced in Texas and is injected into the Midland Pipeline System at various receiving points in Texas. A small amount is produced and injected in New Mexico.

8. Once injected into the Midland Pipeline System, the subject oil becomes part of the common stream of oil.

9. The Midland Pipeline System accommodates oil flow into and out of Midland on an hourly basis.

10. Once injected into the Midland Pipeline System, the Oil Companies relinquish control of the subject oil to the Midland Pipeline System's pipeline companies ("Pipeline Companies") and the subject oil is in the Pipeline Companies' custody and control.

11. Once injected into the Midland Pipeline System, the Oil Companies have a right to withdraw amounts of oil, but have no control over the Pipeline Companies' physical movement of the common stream of oil.

12. The majority of the oil refineries that are the subject oil's final destination are outside of Texas.

13. On its journey to final destinations at oil refineries, the subject oil moves under pressure through the Midland Pipeline System into the Midland Tank Farm.

14. While present in Midland County, the subject oil remains in the Midland Pipeline system. None of the subject oil is removed from the Midland Pipeline System or tanks in Midland County.

15. The movement of the subject oil in the Midland Pipeline System is continuous and does not cease from its injection at the various receipt points into the Midland Pipeline System until it reaches its destination at a refinery.

16. The subject oil is never in Midland County for longer than a temporary period.

17. Once injected into the Midland Pipeline System, the Oil Companies' oil is not removed from its in-transit journey until delivery at a refinery.

18. The Midland Pipeline System converges at the Midland Tank Farm located in Midland County.

19. The Midland Tank Farm functions as an integral part of the Midland Pipeline System.

20. Oil in the Midland Pipeline System arrives at the tanks and exits the tanks through interstate pipelines moving the oil to refineries.

21. The tanks at the Midland Tank Farm exist to facilitate the transportation of crude oil. The tanks at the Midland Tank Farm are not used for storage of oil.

22. For safety reasons and to meet emission standards, the Pipeline Companies require a minimum amount of oil to be maintained in each tank to assure that the tank roof at all times floats or rests on the surface of the oil within the tank.

23. The minimum amount of oil in each tank in use remains constant but varies by tank size, ranging from 8,000 to 10,000 barrels of oil. At any particular time, several hundred thousand barrels of oil may be located in the tanks.

24. The duration the subject oil remains in a tank in Midland Count ranges from 6 to 72 hours.

25. Blending, batching and staging of the subject oil are operational functions of the Midland Pipeline System that are necessary to facilitate the transmission of the subject oil. They do not interrupt the continuity of transit of the subject oil.

26. "Blending" is the mixing of oil. Low sulfur content "sweet crude" is mixed with higher sulfur content "sour crude" in the tanks or transmission lines exiting a tank to achieve a preferred sulfur concentration for transmission to a particular refinery. Nothing is added to or extracted from the subject oil during blending.

27. "Batching" allows different grades of oil (sweet and sour) to remain separate to avoid unintentional mixing.

29. "Staging" is the accumulation of sufficient volumes of oil in the tanks for transmission of oil in the Midland Pipeline system.

30. Any accumulation of the subject oil in the tanks at the Midland Tank Farm is solely to maintain a minimum tank volume incidental to transmission of the oil and for safety reasons. Any accumulation of the subject oil in the tanks is not to facilitate storage of the subject oil.

31. The tanks at the Midland Tank Farm are not used for the storage of the subject oil.

32. The slowing of the subject oil's movement at the Midland tank Farm does not interrupt the continuity of transit.

33. Any delay of the subject oil in Midland County due to blending, batching or staging is to facilitate the continued transportation of the subject oil on its interstate movement.

34. Once injected into the Midland Pipeline System, the subject oil is not removed from its in-transit journey until delivered to a refinery.

35. The movement of subject oil does not cease from injection into the Midland Pipeline System at the point of origin until it reaches its destination at a refinery.

36. The subject oil is not processed, altered or stored while flowing in the Midland Pipeline System.

37. Transportation of the subject oil terminates at refinery destinations.

38. Certain quantities of the subject oil are delivered to refineries in Big Spring, Texas, Wichita Falls, Texas and Longview, Texas. Unless off-loaded at one of these three Texas refineries, the subject oil remains in transit to out-of-state refineries.

39. Ninety-percent of the subject oil in the Midland Tank Farm on January 1, 2003 and on January 1, 2004 left Texas for refineries in other states.

40. Once off-loaded at a refinery, the subject oil is taxable by the local appraisal authorities.

41. Less than 10 percent of the subject oil in Midland tank Farm on January 1, 2003 and on January 1, 2004 remained in the state of Texas.

42. The duration the subject oil remains in a pipeline system moving through Texas to an out of state refinery is no more than approximately two and half weeks.

43. The subject oil is bought, sold and traded by document transfers along the entire journey through the Midland Pipeline System.

44. The transfer of title does not alter the movement of the subject oil.

45. Sales or trades of the subject oil can be accomplished anywhere within the entire pipeline system.

46. Buying, trading and selling of the subject oil does not stop or interrupt the subject oil's continued, in-transit movement in the Midland Pipeline System to a refinery.

47. Buying, trading and selling of the subject oil does not remove oil from the Midland Pipeline System or the Midland Tank Farm because the trading is accomplished through a complex accrual-type accounting system. An owner of oil may sell more barrels of oil than it actually ships through the Midland pipeline System for a particular month. In

that situation, the owner has a negative balance for the month similar to an account payable that is to be discharged at a later date.

48. No documentation can determine the location of a specific barrel of the subject oil or its ownership within the entire pipeline system.

49. No document or calculation can be used to determine the location at any particular time of a specific barrel of the subject oil or its ownership within the Midland Pipeline System or the Midland Tank Farm.

50. It is impossible to trace or identify individual barrels of the subject oil.

51. MCAD's allocation of the volumes of the subject oil to the particular Oil Companies was not reasonably tied to the percentage of the Oil Companies' ownership.

52. The Oil Companies have no ownership interest in any specific individual barrels of the subject oil in the Midland Pipeline System or in the Midland Tank Farm.

53. The subject oil's presence in Texas and in Midland County is purely transitory.

54. During tax years 2003 and 2004, the subject oil was not located in Texas for longer than a temporary period.

55. During tax years 2003 and 2004, the subject oil was not located in Midland County for longer than a temporary period.

56. Any temporary interruptions of the subject oil were for transportation purposes and did not remove the subject oil from interstate commerce.

57. During the tax years at issue, *ad valorem* taxes have been assessed and timely paid on the pipelines, tanks, physical assets and equipment located at the Midland Tank Farm.

58. Upon arrival at a refinery, the subject oil is assessed and listed for taxation by the local appraisal authorities.

59. The Oil Companies' attorneys' fees recoverable under Tax Code §42.29 were reasonable.

60. Plaintiff Amerada Hess Trading Company's attorneys' fees recoverable under Tax Code §42.29 for the prosecution of the Chapter 42 appeal for tax years 2003 and 2004 would be $34,067.80.

61. Plaintiff BP America Production Company's attorneys' fees recoverable under Tax Code §42.29 for the prosecution of the Chapter 42 appeal for tax year 2003 and 2004 would be $34,067.80.

62. Plaintiffs Chevron USA and ChevronTexaco Trading Company's attorneys' fees recoverable under Tax Code §42.29 for the prosecution of the Chapter

42 appeal for tax years 2003 and 2004 would be $51,995.14.

63. Plaintiffs Teppco Crude Oil LLC and Teppco Crude Pipeline LLC's attorneys' fees recoverable under Tax Code §42.29 for the prosecution of the Chapter 42 appeal for tax years 2003 and 2004 2would be $33,376.38.

CONCLUSIONS OF LAW

1. The subject oil is not taxable in Midland County.

2. The location of the subject oil in Midland County is transitory, During tax years 2003 and 2004, the subject oil was not located in this State for longer than a temporary period as required to establish jurisdiction under Tax Code §11.01(c)(1) and thus MCAD does not have jurisdiction to tax the subject oil. Accordingly, the subject oil was not taxable.

3. Even if jurisdiction to tax were established, during tax years 2003 and 2004, the subject oil was exempt from *ad valorem* taxation because one injected into FERC-regulated, common-carrier pipelines, the subject oil has entered the stream of interstate commerce and was not removed from its in-transit journey until delivery at a refinery. Accordingly, the subject oil was exempt under the United States Constitution's Commerce Clause and Tax Code §11.12 and thus not taxable.

4. The subject oil had not acquired taxable situs in Midland County during tax years 2003 and 2004 because it was not located in Midland County for longer than a temporary period as required by Tax Code §21.02(a)(1). Accordingly, the subject oil was not taxable.

5. MCAD's allocation of volumes of oil to the Oil Companies was arbitrary and is unrelated to actual location or ownership of the subject oil.

6. Because the Oil Companies' activities in Midland County do not have a substantial nexus to the State or to Midland County, the taxes assessed on the subject oil do not satisfy the first requirement of *Complete Auto Transit, Inc. v. Brady,* 430 U.S. 274, 279 (1977).

7. Constant presence of the subject oil in Midland County does not establish the State's jurisdiction to tax or taxable situs in Midland County.

8. The Oil Companies' attorneys' fees calculated under Tax Code §42.29 are reasonable.

9. The Oil Companies are not entitled to attorneys' fees under Tax Code §42.29.

Signed on the 23rd day of January, 2007.

APPENDIX E:
Tex. Tax Code Ann. § 21.02

V.T.C.A., Tax Code § 21.02

§ 21.02(a). Tangible Personal Property Generally

Effective: September 1, 2009

(a) Except as provided by Subsections (b) and (e) and by Sections 21.021, 21.04, and 21.05, tangible personal property is taxable by a taxing unit if:
(1) it is located in the unit on January 1 for more than a temporary period;
(2) it normally is located in the unit, even though it is outside the unit on January 1, if it is outside the unit only temporarily;
(3) it normally is returned to the unit between uses elsewhere and is not located in any one place for more than a temporary period; or
(4) the owner resides (for property not used for business purposes) or maintains the owner's principal place of business in this state (for property used for business purposes) in the unit and the property is taxable in this state but does not have a taxable situs pursuant to Subdivisions (1) through (3) of this subsection.

APPENDIX F:
States with personal property taxes

Alabama	ALA. CODE §40-7-1
Alaska	ALASKA STAT. §43.56.210
Arizona	ARIZ. REV. STATE. ANN. §42-11002
Arkansas	ARK. CODE ANN. §26-3-201
California	CAL. REV. & TAX. CODE §201
Colorado	COLO. REV. STATE. ANN. §39-1-101
Connecticut	CONN. GEN. STAT. ANN. §12-41
Florida	FLA. STAT. ANN §196.001
Georgia	GA. CODE ANN. §48-5-3
Idaho	IDAHO CODE ANN. §63-301
Indiana	IND. CODE ANN. §6-1.1-2-1
Kentucky	KY. REV. STAT. ANN. §132.190
Louisiana	LA. REV. STAT. ANN. §47:1951
Maine	ME. REV. STAT. ANN. TIT. 36, §502
Maryland	MD. CODE ANN., TAX-PROP. §6-101
Massachusetts	MASS. GEN. LAWS ANN. CH. 59, §2
Michigan	MICH. COMP. LAWS ANN. §211.1
Minnesota	MINN. STAT. ANN. §272.01
Mississippi	MISS. CODE ANN. § 27-35-7
Montana	MONT. COE ANN. §15-6-101
Nebraska	NEB. REV. STAT. ANN §77-201
Nevada	NEV. REV. STAT. ANN. §361.045
New Hampshire	N.H. REV. STAT. ANN. §72.8
New Jersey	N.J. STAT. ANN. §54:4-1
New Mexico	N.M. STAT. ANN. §7-36-27
North Carolina	N.C. GEN. STAT. ANN. §105-274
Oklahoma	OKLA. STAT. ANN. TIT. 68, §2804

Oregon	OR. REV. STAT. ANN. §307.030
Rhode Island	R.I. GEN. LAWS §44-3-1
South Carolina	S.C. CODE ANN. §12-37-210
Tennessee	TENN. CODE ANN. §67-5-101
Texas	TEX. TAX CODE ANN. §11.01
Utah	UTAH CODE ANN. §59-2-104
Vermont	VT. STAT. ANN. TIT. 32, §3002
Virginia	VA. CODE ANN. §58.1-3500

APPENDIX G:
Midland Central Appraisal District v. BP America et al., No. 09-0273 Petition for Review (Tex. Sup. Ct. May 20, 2009)

IN THE SUPREME COURT OF TEXAS
[Filed May 20, 2009]

Case No. 09-0273
COA#11-07-00048-CV
TC# CV44864 (Consolidated)

MIDLAND CENTRAL APPRAISAL DISTRICT,
Petitioner,
v.
BP AMERICA PRODUCTION COMPANY ET AL.
Respondents.

PETITION FOR REVIEW

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II. The Oil Companies' massive inventories of oil in the Midland tank farm are taxable

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1. Under *Diamond Shamrock*, the property being taxed has a "substantial nexus" with Midland County, Texas

2. A tank is not a pipeline

3. Whether the oil is "in transit" in interstate commerce is not dispositive of the Commerce Clause inquiry

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STATEMENT OF THE CASE

Nature of the Case:	Suit over whether Commerce Clause shield s from State taxation large inventories of Respondent Oil Companies' oil that are continuously present year-round in a tank farm in Midland, regardless of whether the oil is in interstate commerce.
Trial Court:	Hon. John G. Hyde, 238th District

	Court, Midland County, Texas
Trial Court's Disposition:	Rules that Midland Central Appraisal District has no authority to assess taxes on Respondents' oil (Appendix 3)
Court of Appeals:	Eastland Court of Appeals; Chief Justice Wright, joined by Justices McCall and Strange. *Midland Cent. Appraisal Dist. v. BP America Production Co.*,–SW.3d.–, 2009 SL 780456 (Tex. App.–Eastland Mar. 26, 2009, pet. Filed) (Appendix 1)
Court of Appeals' Disposition:	Affirmed.

STATEMENT OF JURISDICTION

The Supreme Court has jurisdiction of this case under Government Code Section 22.001(a)(6) because this case presents an important issue of constitutional law regarding the taxability of goods in interstate commerce under the Commerce Clause, which is similar to the constitutional issue presented to this Court in another pending proceedings. *See* No. 09-0053, *Harrison County Appraisal District v. The Peoples Gas, Light and Coke Company.*

ISSUES PRESENTED

1. Regardless of whether the oil is in interstate commerce, under the U.S. Supreme Court's *Complete Auto* test does the Commerce Clause shield from State taxation massive inventories of oil that are continuously present in a tank farm in Texas.

2. Do massive inventories of oil that are continuously present in a Midland tank farm acquire a taxable situs in Midland County?

3. Was the oil at issue in transit in interstate commerce? (Unbriefed)

TO THE HONORABLE SUPREME COURT OF TEXAS:

In this case, the Court is presented a constitutional issue regarding the taxability of massive inventories of oil in Texas: **Regardless of whether the oil is in interstate commerce, under the U.S. Supreme Court's *Complete Auto* test does the Commerce Clause shield from State taxation massive inventories of oil that is continuously present in a tank farm in Texas?** This Court was recently presented a similar constitutional issue regarding the taxability of a massive inventory of natural gas in underground storage in Texas. *See* No. 09-0053, *Harrison County appraisal District v. The Peoples Gas, Light and*

Coke Company, Pet. at v. This Court should grant review in both proceedings because both decisions conflict with the Oklahoma Supreme Court's decision *In re Assessment of Personal Property Taxes Against Missouri Gas Energy,* --- P.3d. ---, 2008 WL 4648330 (Okla. Oct. 21, 2008). Answering the issue presented in this case will also resolve the interstate-commerce issue that was expressly left open by this Court in *Diamond Shamrock Ref. & Mktg. v. Nueces County Appraisal Dist.,* 876 S.W.2d 298, 302 n.7 (Tex. 1994).

STATEMENT OF FACTS

The court of appeals correctly stated that "the underlying facts in this case are largely undisputed." *BP America,* 2009 WL 780456, at *1.

Respondents are "Oil Companies,"[5] each of which owned a massive inventory of crude oil during the tax years 2003 and 2004 that was continuously present in the four tank farms in Midland (collectively, "the Midland tank farm"). RR 3/93-94; D. Ex. 2, 7, 15, 16, 19, 20, 27-29, 33-54, 75-92. Midland is the only marketing center for oil in Texas. RR 5/76; 7/39, 96. The Midland tank farm facilitates the Oil Companies' marketing activities—it allows them, through a "blending" process, to upgrade the quality of oil volumes, and, through a

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[5] BP America Production Company, Amerada Hess Trading Company, Chevron USA, Inc, Chevron Texaco Products Company, ChevronTexaco Global Supply and Trading Company, TEPPCO Crude Oil, LLC, and TEPPCO Crude P/L LLC.

"batching" process, to gather in the tanks for shipment by pipeline the quantity and quality of oil specified by the purchaser. RR 7/39-40. Because Midland has no refineries, the oil ultimately finds its way to refineries in Texas or other states. RR 3/69.

The oil in the Midland tank farm arrives by pipeline or truck and leaves by pipeline. RR 2/86-88; 4/33-35, 41, 51; 6/7-8, 78-80; 7/19-21, 76. Individual barrels of oil ordinarily remain in the tank farm from between less than a day to one week—on average, between 24 to 36 hours.[6] RR 3/28; 5/46; 7/25. However, massive inventories of the Oil Companies' oil are continuously present in the tank farm throughout the year, as outgoing oil is replenished by incoming oil. RR 3/34; 5/44-45; 7/46-47; 8/53. The tank farms are required to maintain certain minimum volumes of oil for safety reasons. 5/43-44. The Oil Companies also maintain additional volumes in the tanks as "working stock," to facilitate prompt shipments to customers. RR 3/26-27, 51-52. At any given time, the Oil Companies' inventories of oil in the Midland tank farm collectively total around 3 million barrels. D. Ex. 3, 14, 23, 58, 96.

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[6] The court of appeals stated in its background facts "The time from entry into a tank to exit from a tank is six to seventy-two hours." *Midland Cent. Appraisal Dist. V. BP America Production Co.*, ---S W 3d ---, 2009 WL 780456, at *2 (Tex App. –Eastland Mar. 26, 2009, pet, filed). It is not clear from the record how the court of appeals arrived at these figures, but the District will not quibble with them

Petitioner Midland Central Appraisal District included on the tax rolls for the tax years 2003 and 2004 an allocable share of each of the Oil Companies' inventories of oil that were present in the Midland tank farm on January 1 of those years. RR 2/63-78; 9/16-39. The Oil Companies contested taxation of their oil, and, following a bench trial, the trial court rendered judgment in their favor. App. 2. The court of appeals affirmed, concluding that (1) the oil was shielded from taxation by the Commerce Clause of the U.S. Constitution, and (2) the oil did not acquire a taxable situs in Midland County because it was present there for only a "temporary" period. App. 1. The petition followed.

SUMMARY OF THE ARGUMENT

Regardless of whether Respondent Oil Companies' oil is in interstate commerce while in the Midland tank farm, taxation of the oil is permissible under the Commerce Clause because all four prongs of the U.S. Supreme Court's test are satisfied. *See Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279 (1977). The court of appeals focused exclusively on the first prong, erroneously concluding that the tax failed to pass the test because it did not apply to an "activity" with a "substantial nexus" with Texas. Under *Diamond Shamrock Ref. & Mktg. v. Nueces County Appraisal Dist.*, 876 S.W.2d 298 (Tex. 1994), the "substantial nexus" prong is satisfied because massive inventories of the Oil Companies' oil are continuously present in the Midland tank farm throughout the year.

As *Diamond Shamrock* makes clear, the proper focus for the Commerce Clause inquiry is on the *inventories* of oil that are continuously present in the tank farm, not on *individual barrels* of oil that enter and exit the tank farm. Although individual barrels may remain in the tank farm for a relatively short period of time, that is immaterial. Throughout the year, millions of barrels of oil are continuously present in the tank farm. It is those continuously present, massive inventories that create a "substantial nexus" with Texas.

For a similar reason, the court of appeals' conclusion that the oil did not acquire a taxable situs in Midland County is erroneous. Because massive inventories of oil were continuously present in the Midland tank farm during the tax years in question, those inventories acquired a taxable situs in Midland County. Again, the proper focus is on inventories, not individual barrels.

ARGUMENT

I. This Court should grant review because this case presents an important, recurring issue of constitutional law.

By its prior decision in *Diamond Shamrock*, this Court has already made clear that the issue of the taxability of large volumes of oil in a tank farm in Texas is jurisprudentially important. *See* 876 S.W.2d 298. In that case, the Court rejected the oil company's argument that the oil in the tank farm was not taxable. However, the Court expressly left open the question whether the result would be the

same in a case, like this one, in which we assume that the property is in interstate commerce. *Id.* At 302 n.7. This is the right time to decide this open question because lower courts are being asked to confront it and need the Court's guidance. The Texarkana Court of Appeals recently addressed a similar issue, and its decision has been challenged in this Court. *See* No. 09-0053, *Harrison County Appraisal District v. The Peoples Gas, Light and Coke Company.* The Court should grant both cases and decide the important, related constitutional questions. *See* TEX. R. APP. P. 56.1(a)(4).

II. The Oil Companies' massive inventories of oil in the Midland tank farm are taxable.

A. The court of appeals erroneously concluded that the tax at issue fails the first prong of the *Complete Auto* test.

A little over 30 years ago, the U.S. Supreme Court issued its watershed decision in *Complete Auto,* which resolved the confusion created by competing lines of decisions concerning the taxability of goods in interstate commerce. *See* 430 U.S. at 279. One line of cases established a *per se* bar, "holding that a tax on the 'privilege' of engaging in an activity in the State may not be applied to an activity that is part of interstate commerce." *Id.* At 278. Another line of cases permitted taxation, "stating that '[i]t was not the purpose of the commerce clause to relieve those engaged in interstate commerce from their just share of state

tax burden even though it increases the cost of doing the business.'" *Id.* At 279.

Complete Auto overruled the first line of decisions. *See* 430 U.S. at 279. The Court thereby rejected the notion that "interstate commerce should enjoy a sort of 'free trade' immunity from state taxation." *Id. at 278.* The Court instead embraced the philosophy that "interstate commerce may be made to pay its way." *Id.* 281.

After *Complete Auto,* even if property is in interstate commerce, that property can be taxed if the tax satisfied a four-prong test: "when the tax [1] is applied to an activity with a substantial nexus with the taxing State, [2] is fairly apportioned, [3] does not discriminate against interstate commerce, and [4] is fairly related to the services provided by the State." *Id.* At 279. After *Complete Auto,* courts frequently decline to grapple with whether the property in question is in interstate commerce, which often requires a cumbersome, hair-splitting analysis. Instead, these courts simply *assume,* for purposes of their decision, that the property *is* in interstate commerce, and evaluate the tax under *Complete Auto.* If the tax satisfies that test, whether the property is in interstate commerce is immaterial because, regardless, "[the Court] will sustain [the] tax against a Commerce Clause challenge." *Quill Corp. v. North Dakota,* 504 U.S. 298, 311 (1992). This is the approach taken by the *Complete Auto* Court itself, *see* 430 U.S. at 276 n.4, and the approach taken in this petition.

The Eastland Court of Appeals applied only the first prong of the *Complete Auto* test, concluding that the tax failed because it did not apply to an "activity" with a "substantial nexus" with Texas. *See Midland,* 2009 WL 780456 at *7. Although the District is prepared to demonstrate on full briefing that the tax at issue satisfies all four prongs of the *Complete Auto* test, because the court of appeals confined its discussion to the first prong, this petition will likewise address only that prong.

1. Under *Diamond Shamrock,* the property being taxed has a "substantial nexus" with Midland County, Texas.

The first prong of the *Complete Auto* test requires that the tax be "applied to an activity with a substantial nexus with the taxing State." *Complete Auto,* 430 U.S. at 279. There must be only "some definite link, some minimum connection between a *state* and the . . .*property*. . .it seeks to tax." *Allied-Signal, Inc. v. Dir., Civ. Of Taxation,* 504 U.S. 768, 777 (1992) (emphasis added). *Property*—massive inventories of oil owned by the Oil Companies and located in the Midland tank farm—is what the District seeks to tax here. There is a "definite link" and far more than "some minimum connection" between that "property" and the "state"—Texas. Day in and day out throughout the year, massive inventories of the Oil Companies' oil—the "property" sought to be taxed—can be found in tanks at the tank farm in Midland, Texas.

In *Diamond Shamrock*, an oil company similarly contested *ad valorem* taxation of inventories of its oil in tanks. 876 S.W.2d at 299. The company argued that because its oil was "in transit"—held in the tanks for a maximum of 12 to 25.3 days—both the Import-Export Clause and Commerce Clause precluded taxation. *Id.* The case did *not* involve property in interstate commerce. *Id.* Nonetheless, the Court applied the *Complete Auto* test in evaluating the company's Commerce Clause challenge because the oil in question was shipped from foreign sources. *Id.* At 299, 301. When a state tax is imposed on foreign commerce, a Commerce Clause challenge to the tax is analyzed under both the *Complete Auto* test plus an additional two-prong test. *Id.* At 301. Thus, this Court's analysis of the *Complete Auto* test in *Diamond Shamrock* is applicable here.

Diamond Shamrock supports the District's position. First a general matter, the mere fact that goods are "in transit" is not dispositive of the Commerce Clause question. Even if they are in transit they may still be taxable. *Id.* At 302. It depends on "the circumstances which make the goods 'in transit." *Id.* "For instance, if oil in tanks on trucks merely passed through Nueces County without stopping, it would be 'in transit' in a way that would cause it to have little or no nexus with the county." *Id.*

The Court went on to explain that "under other circumstances, as in this case, there can be sufficient nexus to support a tax even if goods are

technically 'in transit." *Id.* The Court concluded that the nexus requirement is satisfied when, as in this case, a large quantity of the taxpayer's oil is present year-round in the taxing jurisdiction:

> Here, Diamond Shamrock, argues that "[t]he incidence of the tax sought to be imposed is merely the oil's passing through—actual movement through—Nueces County." This argument is only persuasive, however, if one considers each barrel of oil separately. Instead, under *Exxon [Corp. v. San Patricio County,* 822 S.W.2d 269 (Tex. App.—Corpus Christi 1991, writ denied)], the incidence of the tax sought to be imposed is the year-round presence of a large quantity of Diamond Shamrock's oil at rest in Nueces County, which receives government services. We hold that these facts satisfy the first and fourth nexus prongs of *Complete Auto,* and that no interference with foreign commerce is demonstrated in this case. Therefore, the tax here does not violate the Commerce Clause.

Id. at 303.

Thus, a "substantial nexus" is established when "there is large quantity of [the taxpayer's] oil at rest in [the taxing jurisdiction], which receives government services." That is precisely what is involved in this case. If "one considers each barrel of oil separately," the result would be different here, as it would have been in *Diamond Shamrock.* The evidence in this case shows that *individual barrels* of oil do not stay in the Midland tank farm for very long—only 24 to 36 hours on average, RR 3/28—but

that is *not* the criteria by which "substantial nexus" is evaluated under *Diamond Shamrock*.

If one were to go out to the Midland tank farm at any time during the year and peer into one of the tanks, one would see an enormous quantity of oil. That oil would look and smell much like the oil in the tanks in *Diamond Shamrock*. And it would be just as flammable, making necessary the protections afforded by local governmental services. Whether individual barrels of oil remained in the Midland tank farm for 24 to 36 hours or 24 to 36 minutes is immaterial. Just as the oil in the tanks in *Diamond Shamrock* had a "substantial nexus" with Texas (even through the goods were technically "in transit"), so, too, the massive inventories of oil present year round in the Midland tank farm have a "substantial nexus" with Texas, regardless of any "in transit" status. Thus, the first prong of the *Complete Auto* test is satisfied and the court of appeals erred in concluding otherwise.

2. A tank is not a pipeline.

The court of appeals feel prey to the Oil Companies' argument that a tank in a tank farm is essentially just a "wide spot in a pipeline." *See Midland*, 2009 WL 780456 at *3. But this Court has indicated that tanks and pipelines are different: "Oil passing through a county without stopping, in pipelines" is not taxable, *Diamond Shamrock*, 876 S.W.2d at 304, whereas a "year-round presence of a large quantity of [a taxpayer's] oil" in tanks is taxable, even if individual barrels regularly enter

the tanks and exit by pipeline "in transit" to another location, *id.* At 303. In short, a tank is a tank, and a pipeline is a pipeline. Because this case involves tanks, as in *Diamond Shamrock*, the result should be the same.

This distinction makes sense. It would unduly burden interstate commerce if, for instance, multiple counties in Texas could tax bulk shipments of oil that merely passed without stopping through their jurisdictions in a pipeline on its way to another state. However, taxing oil inventories that are continuously present in a massive tank farm such as the one in Midland—which serves the only market center for oil in Texas—does not present the same burden on interstate commerce. Here, because the tank farm is located in a single county, there is no danger of multiple taxation of the inventories located there on January 1. To the contrary, allowing the Oil Companies to avoid paying taxes on their oil in the Midland tank farm means that other property owners in Midland with inventories of goods—such as Mom-and-Pop grocery stores—must disproportionately shoulder the tax burden. The inherent unfairness is manifest when one considers that oil in a tank farm—particularly one the colossal size of the one in Midland—places far greater demands on local governmental services than does a small store.

The grocery store analogy is helpful to understanding how a tax on an inventory of goods works. A bunch of bananas may come and go from the grocer's shelves in a matter of hours, but so long

as the bananas were present in the store on January 1 of a given tax year, when the *ad valorem* tax "snapshot" was taken, they formed part of the collective inventory subject to taxation. RR 9/62-63. In the same way, an individual barrel of oil may come and go from the Midland tank farm within 24 to 36 hours, but so long as it was present in the tank farm on January 1, when the *ad valorem* tax "snapshot" was taken, it formed part of the collective inventory subject to taxation. Thus, just as one need not determine precisely how many days, ours or minutes a bunch of bananas remained a part of the inventory in the grocery store, so, too, one need not determine how long an individual barrel of oil remained a part of the inventory in the tank farm. The key is that on January 1 of the tax years in question, when the *ad valorem* "snapshot" was taken, both the grocery store and the tank farm held substantial inventories of goods subject to taxation.

The court of appeals suggests that there is no unfairness to local taxing authorities by allowing the Oil Companies to escape their tax obligations because "*ad valorem* taxes are assessed on the pipelines, tanks, physical assets, and equipment at the tank farm." *Midland,* 2009 WL 780456 at *3. But just because the Oil Companies and/or other companies own other property in the tank farm that is taxed does not mean that the oil should be exempt. It is the ***oil*** in the tank farm, moreover, that creates the need for fire protection and other governmental services. If the tanks were empty, there would be no fire danger. Because the oil creates need for governmental services, the reluctant Oil Companies

here should "be made to pay [their] way," *Complete Auto,* 430 U.S. at 281, just like the reluctant oil company in *Diamond Shamrock* was made to pay its way. This is the fair result and, under *Complete Auto,* the Commerce Clause poses no obstacle.

3. Whether the oil is "in transit" in interstate commerce is not dispositive of the Commerce Clause inquiry.

Much of the court of appeals' analysis is devoted to determining whether the oil was "in transit" in interstate commerce while it was in the Midland tank farm. *See Midland,* 2009 WL 780456 at *4-6. While that analysis is germane to the question of whether Commerce Clause inquiry was *triggered at all* under the circumstances of this case (an issue preserved but not briefed in this petition), it is not dispositive of the merits—whether the oil is shielded from taxation *even if it is* "in transit" in interstate commerce. Nonetheless, it is apparent from the court of appeals' analysis that is erroneously attached controlling significance to the "in transit" point in deciding the entire Commerce Clause question. *See Id.* at *7. That incorrect analysis is confusing and further reason that the Court should grant this case.

In *Diamond Shamrock,* the parties actually ***stipulated*** that the oil was ***"in transit"*** while it was in the tanks in Nueces County. *See Diamond Shamrock,* 876 S.W.2d at 300. Despite the oil's in transit" status, however, this Court rejected the oil company's argument that this was sufficient to

defeat the "substantial nexus" prong of the *Complete Auto* test:

> Diamond Shamrock argues that the tax here cannot pass the first and fourth prongs of the *Complete Auto* test because the goods are "in transit." We disagree.

Id. at 301. Although this Court did not hold that the result would necessarily be the same in a case involving goods in interstate commerce, the Court expressed substantial doubt that the "in transit" status of goods is dispositive under modern Commerce Clause analysis:

> Our holding today is limited to foreign goods "in transit" through only one state, which remain in that state. **Even as to goods in interstate commerce,** however, **the question of whether Diamond Shamrock's "in transit" argument has any remaining validity under the modern Commerce Clause analysis is questionable,** at least as to goods which have entered the state of their final destination.

Id. at 302 n.7 (emphasis added). Although this court did not definitively resolve the issue in *Diamond Shamrock,* it correctly noted that the U.S. Supreme Court "rejected what amounted to an 'in transit' argument" in *D.H. Holmes,* a case involving goods in

interstate commerce. *Id.* (citing *D.H. Holmes Co. v. McNamara*, 486 U.S. 24, 30 (1988)).

In its recent *Missouri Gas* decision, the Oklahoma Supreme Court resolved the question left open by this Court in *Diamond Shamrock*. *See In re Assessment of personal Property Taxes Against Missouri Gas Energy*, 2008 SL 4648330 at *10 (holding that "even if [the taxpayer's] storage gas is in transit in interstate commerce, that does not automatically mean that a tax levied against it would contravene the Commerce Clause.") The court of appeals' decision here is in conflict with *Missouri Gas* because the court of appeals attaches controlling significances to the "in transit" status of the oil. As this Court has recognized, that goods are "in transit" remains dispositive in the context of goods in the stream of *export* under the **Import-Export Clause.** *See Virginia Indonesia Co. v. Harris County Appraisal Dist.*, 910 S.W.2d 905, 911 (Tex. 1995), *cert. denied*, 518 U.S. 1004 (1996) (concluding that "by explicitly articulating an exception for in-transit goods, *Michelin [Tire Corp. v. Wages*, 423 U.S. 276 (1976)] appears to preserve bright-line immunity for goods in the stream of export.") The instant case, however, does not involve the Import-Export Clause.

Whether goods are in "export transit" also remains dispositive under the **Export Clause.** *See United States v. International Business Machines Corp.*, 517 U.S. 843, 863 (1996) ("We conclude that the Export Clause does not permit assessment of nondiscriminatory federal taxes on goods in export transit.") In *IBM*, the Supreme Court made clear

that modern Commerce Clause analysis is substantially different from Export Clause analysis due to the textual disparities between the two clauses:

> Our rejection in *Complete Auto* of much of our early dormant Commerce Clause jurisprudence did not, however, signal a similar rejection of our Export Clause cases. Our decades-long struggle over the meaning of the nontextual negative command of the dormant Commerce Clause does not lead to the conclusion that our interpretation of the textual command of the Export Clause is equally fluid. **At one time, the Court may have thought that the dormant Commerce Clause required a strict ban on state taxation of interstate commerce, but the text did not require that view. The text of the Export Clause, on the other hand, expressly prohibits Congress from laying any tax or duty on exports.** These textual disparities strongly suggest that shifts in the Court's view of the scope of the dormant Commerce Clause should not, and indeed cannot, govern our interpretation of the Export Clause.

Id. at 851-52 (emphasis added). This holding in *IBM* illustrates how the court of appeals' decision in this case is based upon outdated Commerce Clause

analysis that is comparable to the analysis that remains applicable in cases, unlike this one, involving the Import-Export Clause or the Export Clause. In sum, although there remains a strict ban on the taxation of goods "in transit" in the stream of export, there no longer is a strict ban on the taxation of goods "in transit" in interstate commerce. This Court should grant review to embrace the modern approach to Commerce Clause analysis adopted by the Oklahoma Supreme Court in *Missouri Gas*. That approach is consistent with the analysis adopted by this Court in *Diamond Shamrock* and inconsistent with the analysis adopted by the court of appeals here.

4. There is no danger of multiple taxation.

Finally, the court of appeals concluded that imposing a tax on the Oil Companies' oil in Midland under the circumstances of this case could "potentially" create a danger of "an impermissible multiple burden on interstate commerce":

> Furthermore, if the tax in this case is upheld, then *ad valorem* taxes could potentially be levied by any taxing authority on oil in transit but located, at the time of assessment, in the portion of an interstate pipeline system within the boundaries of that taxing authority. The result would be an impermissible multiple burden on interstate commerce.

Midland, 2009 SL 780456 at *7. The court's speculation about this "potential" danger is meritless. On January 1 of any given tax year, the Oil Companies' inventories of oil in the Midland tank farm are located *only* in Midland and, hence, are taxable *only* there.

To illustrate the point, assume, hypothetically, that after Oil Company X's oil leaves Midland, it is shipped by pipeline to a tank farm in Cushing, Oklahoma. On January 1 of a particular year, Oil Company X owns 10,000 barrels of oil in the Midland tank farm and another 10,000 barrels of oil in the Cushing tank farm. Under this hypothetical, all 20,000 barrels would be subject to state taxation, but only half (10,000 barrels) would be subject to taxation by the Midland authorities and the other half (10,000 barrels) by the Cushing authorities. Under *Diamond Shamrock*, the oil in the pipeline between Midland and Cushing would not be taxable. 876 S.W.2d at 304. This scenario creates a "multiple burden" to Oil Company X only in the sense that it would be required to pay its fair share of the local tax on its oil in two different jurisdictions where it simultaneously owned massive inventories of oil. However, there is nothing "impermissible" about that. The same oil is not being taxed twice—Midland and Cushing are each merely receiving tax revenue to which they are justly entitled for property owned by Oil Company X in their respective jurisdictions.

B. The court of appeals erred in concluding that the massive inventories of the Oil Companies' oil were only "temporarily" located in Midland County and, therefore, acquired no taxable situs there.

Section 21.02(a)(1) of the Texas Tax Code provides that "tangible personal property is taxable by a taxing unit if it is located in the unit on January 1 for more than a temporary period." TEX. TAX CODE §21.02(a)(1). The court of appeals concluded that the oil did not acquire a taxable situs in Midland County because "[t]he oil was merely transported through Midland County and was only temporarily located in the county." *Midland,* 2009 SL 780456 at *7. A comparable conclusion was rejected in *Exxon Corp. v. San Patricio County Appraisal Dist.,* 822 S.W.2d 269 (Tex. App.--Corpus Christi 1991, writ denied), a case relied upon heavily by this Court in *Diamond Shamrock. See* 876 S.W.2d at 303-04.

Exxon involved the taxability of oil in seventeen tanks located in San Patricio County. The taxpayer oil company there, likewise citing section 21.02 of the Texas Tax Code, made the same argument the court of appeals embraced here: "Exxon submits the theory that each barrel of oil appraised on January 1, 1988 remained only *temporarily* in, and was merely *being transported through,* the County and therefore could not have attained situs there for tax purposes." *Exxon,* 822 S.W.2d at 271 (emphasis added). The *Exxon* court rejected this argument, making clear that the focus should *not* be on *individual barrels* of oil:

> **We do not agree that when determining whether a large quantity of oil is to be taxed we should consider the situs of each individual barrel separately.** The parties stipulated and the trial court found that Exxon maintained over 400,000 net barrels of crude oil in the County at all times in 1987 and 1999. The fact that each individual barrel does not remain in the County for more than seventeen days, but rather flows sporadically through the working tanks, is inconsequential.

Id. at 272 (emphasis added). Instead, the focus should be on the massive inventories of oil that are continuously present in the tanks:

> **[B]ecause Exxon held a quantity of over 400,000 barrels of oil in San Patricio County in seventeen tanks at all times, a massive quantity was located in the County throughout 1987 and 1988 for more than a temporary period. That the particular oil present on January 1, 1988, shortly left the county is not determinative.**

Id. at 272-73 (emphasis added). This holding is applicable here. Because the Oil Companies "held a quantity of [around 3 million] barrels of oil in [the

Midland tank farm] at all times, a massive quantity was located in the County throughout [2003] and [2004] for more than a temporary period. That the particular oil present on January 1, [2004] shortly left the county is not determinative." Hence, the oil acquired taxable situs in Midland County.

PRAYER

Because neither the Commerce Clause not the Texas Tax Code precludes the tax at issue, this Court should grant review, reverse the judgment of the court of appeals, and render judgment that the Oil Companies' oil is subject to taxation in Midland County.

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I hereby certify that a true and correct copy of the Petition for Review was served upon the foregoing counsel of record via U.S. Mail, on May 20, 2009.

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